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No. _____

In The

Supreme Court of the United States

October Term, 1980

EUGENE HUNT,

Appellee,

vs.

RICHARD ROTH, Sheriff of Douglas County, Nebraska; and JOSEPH VITEK, Warden, Douglas County Corrections Center, and Director of Douglas County Department of Corrections,

Appellant,

vs.

STATE OF NEBRASKA,

Appellant.

EUGENE L. HUNT,

Appellee,

vs.

JAMES M. MURPHY, District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska,

Appellant.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the excessive bail clause of the Eighth Amendment to the United States Constitution is applicable to the various states through the Fourteenth Amendmen to the United States Constitution?

2. Whether the excessive bail clause of the Eighth Amendment to the United States Constitution creates a constitutional right to bail or whether it simply prohibits excessive bail where otherwise authorized?

3. Whether Article I, Section 9, of the Constitution of the State of Nebraska which provides as is relevant "All persons shall be bailable . . . except for . . . sexual offenses involving penetration by force or against the will of the victim, . . . where the proof is evident or the presumption great" is violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution?

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JAMES M. MURPHY, District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska,

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The decision in the combined cases of *Eugene L. Hunt v. Richard Roth, Etc.,* No. 80-2067, and *Eugene L. Hunt v. James M. Murphy,* No. 80-2068, was filed by the United States Court of Appeals for the Eighth Circuit on May 13, 1981. This opinion is as of yet unreported and it is attached hereto as "Appendix A."

The decision in the combined cases of *Eugene L. Hunt v. Richard Roth, Etc.*, CV80-0-361, and *Eugene L. Hunt v. James M. Murphy*, CV80-0-377, was filed by the United States District Court for the District of Nebraska on October 17, 1980. This decision is unreported and is attached as "Appendix B."

GROUNDS OF JURISDICTION

This is an appeal from a finding by the United States Court of Appeals for the Eighth Circuit that Article I, Section 9, of the Constitution of the State of Nebraska is in part violative of the Eighth and Fourteenth Amendments to the United States Constitution. This finding was filed by the United States Court of Appeals for the Eighth Circuit on May 13, 1981.

Hunt v. Roth, supra, is an application for a petition for habeas corpus brought pursuant to 28 U. S. C. § 2254 and *Hunt v. Murphy, supra*, is a civil rights action brought pursuant to 42 U. S. C. § 1983.

This Court's jurisdiction over these combined cases is derived from 28 U. S. C. § 1254 (2). A copy of the Notice of Appeal filed in the United States Court of Appeals for the Eighth Circuit is attached as "Appendix C."

CONSTITUTIONAL PROVISIONS INVOLVED

1. Section 1, Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. The Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

3. Article I, Section 9, of the Constitution of the State of Nebraska:

> All persons shall be bailable by sufficient sureties, except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Article I, Section 9, of the Constitution of the State of Nebraska can be found in Volume 2 of the Revised Statutes of Nebraska (Reissue 1979) on page 62.

QUESTIONS PRESENTED

1. Whether the excessive bail clause of the Eighth Amendment to the United States Constitution is applicable to the various states through the Fourteenth Amendment to the United States Constitution?

2. Whether the excessive bail clause of the Eighth Amendment to the United States Constitution creates a constitutional right to bail or whether it simply prohibits excessive bail where otherwise authorized?

3. Whether Article I, Section 9, of the Constitution of the State of Nebraska which provides as is relevant "All persons shall be bailable . . . except for . . . sexual offenses involving penetration by force or against the will of the victim, . . . where the proof is evident or the presumption great" is violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE CASE

In November of 1978 the people of the State of Nebraska by a direct popular vote of 356,000 in favor to 80,000 against amended Article I, Section 9, of the Constitution of the State of Nebraska so as to provide:

> All persons shall be bailable by sufficient sureties, except for treason, *sexual offenses involving penetration by force or against the will of the victim,* and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Neb. Const., Art. 1, §9 (language added by amendment emphasized).

Subsequent to the passage of the constitutional amendment set out above, Eugene Hunt was charged in the District Court of Douglas County, Nebraska, with multiple

counts of forcible first degree sexual assault. For purposes of bail consideration only, Mr. Hunt while represented by counsel stipulated that the proof was evident and the presumption was great and the Douglas County District Court, the Honorable James M. Murphy, presiding, one of the parties herein, denied bail.

Thereafter, Mr. Hunt sought habeas corpus relief in the United States District Court for the District of Nebraska and filed a civil rights action against Judge Murphy, seeking certain declaratory relief. The United States District Court for the District of Nebraska denied all requested relief and an appeal was taken to the United States Court of Appeals for the Eighth Circuit. The United States Court of Appeals for the Eighth Circuit granted Mr. Hunt's declaratory relief sought pursuant to the Civil Rights Act and denied the habeas corpus relief sought on the basis of mootness. The United States District Court for the District of Nebraska did not require Mr. Hunt to seek relief in the Supreme Court of the State of Nebraska inasmuch as identical issues had been raised in a previous case, *Parker v. Roth*, 202 Neb. 850, 278 N. W. 2d 106 (1979), *cert. denied*, — U. S. —, 62 L. Ed. 2d 177, 100 S. Ct. 240 (1979).

Of the four charges under which Mr. Hunt was denied bail pursuant to Article 1, Section 9, of the Constitution of the State of Nebraska, he was convicted of three and acquitted of one. On the charge of first degree sexual assault on a child, Mr. Hunt was sentenced to 12 to 15 years imprisonment on December 11, 1980, and thereafter filed a direct appeal to the Nebraska Supreme Court which is now pending under Case No. 43955 and which is not expected to be briefed, argued, and decided by that court until late 1981 or early 1982.

On the two charges of first degree forcible sexual assault, Mr. Hunt was sentenced on November 5, 1980, to consecutive terms of 8 to 15 years imprisonment and thereafter filed a direct appeal to the Nebraska Supreme Court where they are now pending under Case No. 43885 and are likewise not expected to be briefed, argued, or decided by that court until at least late 1981 or early 1982.

WHY THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The constitution of a state is the fundamental and organic law of that state. See e.g., *Ware v. Hylton*, 3 Dall 199, 1 L. Ed. 568 (1796); *McCulloch v. Maryland*, 17 U. S. 316 (1819). It represents the direct and basic expression of the sovereign will of the people of a state and is the absolute rule of action with respect to all matters it addresses. A provision of a state constitution is generally presumed not to be in conflict with the federal constitution unless the contrary is clearly shown and in order to justify a federal court in pronouncing a provision of a state constitution to be in contravention of the federal constitution the impediment must be so clear as to be free from all doubt. *Sincock v. Duffy*, 215 F. Supp. 169 (D. Del. 1963), affirmed 377 U. S. 695.

Presented in this appeal is an instance wherein the United States Court of Appeals for the Eighth Circuit has declared a provision of the constitution of the State of Nebraska enacted by a direct vote of the people to be

violative of the excessive bail clause of the Eighth Amendment to the United States Constitution which they concluded was applicable to the states through the Fourteenth Amendment to the United States Constitution.

This appeal presents the question, which prior to this time has not been directly answered by this court, of whether or not the excessive bail clause of the Eighth Amendment to the United States Constitution is applicable to the states through the Fourteenth Amendment to the United States Constitution. While this court has not directly so held it has in at least two instances intimated that such would be the case. *Gernstein v. Pugh,* 420 U. S. 103, *Schilb v. Kuebel,* 404 U. S. 357.

In addition this case presents the question of whether or not the Eighth Amendment to the United States Constitution creates a constitutional right to bail or whether by its express language it merely prohibits excessive bail where a right to bail otherwise exists. No instances have been found wherein this court has held that a fundamental and absolute constitutional right to bail is created by this clause contained within the Eighth Amendment. The United States Court of Appeals for the Eighth Circuit did however below find such an absolute constitutional right to exist.

This holding of the United States Court of Appeals for the Eighth Circuit appears to conflict with a previous decision of that court. *Mastrian v. Hedman,* 326 F. 2d 708 (8th Cir. 1964), and with dicta announced by the Third Circuit in *Sistrunk v. Lyons,* — F. 2d — (3rd Cir. 1981, Case No. 80-1649) 49 L. W. 2719, 3-31-81. This decision by the United States Court of Appeals for the Eighth Circuit also appears to be in conflict with the

holding of this court in *Carlson v. Landon*, 342 U.S. 524 (1951).

The State of Nebraska suggests that the Eighth Amendment to the United States Constitution does not create a right to bail, it only provides that bail shall not be excessive in those cases where it is otherwise proper to grant bail. The state reaches this conclusion based upon a reading of the plain and simple language of the constitutional amendment; a review of the historical background of the enactment of the amendment and an analysis of judicial interpretation construing it. Therefore, with respect to the question of whether or not the Eighth Amendment provides an absolute fundamental right to bail in all cases it is suggested that a substantial federal question is in fact presented.

Additionally, this appeal presents the question of whether or not Article I, Section 9 of the Constitution of the State of Nebraska violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Inherent in the presentation of this question is the question of whether or not under an Equal Protection analysis the denial of bail affects a fundamental right or whether such a denial is to be judged by the less strict minimum scrutiny or conceivable basic standards. *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973).

The State suggests in this appeal as it did below that its denial of bail to persons accused of forcible sexual offenses where the proof is evident and presumption is great constitutionally reflects a legitimate societal desire to protect society from the repetition of these types of heinous crimes by accused persons and that the pre-trial

release of such persons poses a real danger and threat to the people of this State from such persons.

The State suggests that people of Nebraska reasonably determined that the crime of first degree sexual assault was distinct from other crimes and that therefore the welfare of society demanded differential treatment of persons so charged. The action of the United States Court of Appeals for the Eighth Circuit declaring this provision of the Nebraska Constitution to be violative of federal constitution therefore raises serious and substantial federal questions.

The state concludes that the questions presented by this appeal are so substantial so as to require full consideration by this court with briefs on the merits and oral argument.

Respectfully submitted,

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Attorneys for Appellee.

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

Nos. 80-2067 and 80-2068

No. 80-2067.

Eugene L. Hunt,

Appellant,

vs.

Richard Roth, Sheriff of Douglas County, Nebraska and Joseph Vitek, Warden, Douglas County Corrections Center, and Director, Douglas County Department of Corrections,

Appellees.

Appeal from the United States District Court
for the District of Nebraska.

No. 80-2068.

Eugene L. Hunt,

Appellant,

vs.

James M. Murphy, District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska,

Appellee.

Appeal from the United States District Court
for the District of Nebraska.

Submitted: February 10, 1981
Filed: May 13, 1981

Before LAY, Chief Judge, STEPHENSON and ARNOLD, Circuit Judges.

LAY, Chief Judge.

Eugene L. Hunt was charged in Douglas County District Court, Omaha, Nebraska, with first degree sexual assault on a child and three counts of first degree forcible sexual assault. He was also charged with several counts of non-sexual felonies and one count of nonforcible sexual assault. Although Hunt was admitted to bail on the non-sexual offenses, the Omaha Municipal Court denied bail on the sexual offenses. On May 23, 1980, Hunt appeared in Douglas County District Court for a review of the denial of bail. The state district court refused to set bail on the rape charges, relying on Article I, Section 9 of the Nebraska Constitution:

> All persons shall be bailable by sufficient sureties, except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the proof is evident or the presumption great.[1]

For the purposes of the state district court proceedings, Hunt stipulated that the proof was evident or the presumption great.

On June 2, 1980, Hunt filed a petition for habeas corpus in United States District Court. The district court allowed the state to intervene in the habeas action. On June 9, 1980 Hunt filed a complaint under 42 U. S. C. § 1983 seeking injunctive and declaratory relief. The cases were consolidated. On October 17, 1980, the district court denied the writ of habeas corpus and dismissed Hunt's complaint seeking declaratory and injunctive relief, on the rationale that *Parker v. Roth*, 202 Neb. 850, 278 N. W. 2d

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1 The Nebraska Constitution was amended in 1978. Prior to that time only treason and murder were nonbailable offenses where the proof was evident or the presumption great.

106, *cert. denied*, 444 U. S. 920 (1979), had correctly rejected federal constitutional challenges to Article I, section 9 of the Nebraska Constitution. Hunt appeals both judgments. In view of Hunt's subsequent convictions[2] we dismiss the appeal from the denial of the petition for writ of habeas corpus and his prayer for immediate release on bond as moot; we find, however, that the district court erred in dismissing Hunt's complaint for declaratory judgment and hold that Nebraska's classification of sexual offenses as nonbailable violates the "excessive bail" clause of the eighth amendment to the Constitution of the United States.

I. Preliminary Issues.

A. Existence of a "Case or Controversy."

Although the state has not challenged the jurisdiction of this court to entertain this appeal, we do so on our own motion.[3]

Since Hunt has been convicted, his effort to obtain pretrial release on bail is arguably moot. Hunt's counsel urges that Hunt's appeal is not moot because it raises

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2 Hunt was convicted of first degree sexual assault on a child on October 8, 1980; on December 11, 1980, he was sentenced to 12-15 years in prison. An appeal to the Nebraska Supreme Court is pending. One first degree forcible sexual assault charge was dismissed on December 16, 1980. Hunt was found guilty of the remaining two first degree forcible sexual assault charges on September 10, 1980, and November 5, 1980. On November 13, 1980, he received consecutive terms of 8-15 years in prison. Hunt filed direct appeals from both these convictions.

3 After oral argument the parties were requested to submit supplemental briefs on the issues of mootness and abstention.

questions "capable of repetition, yet evading review." Under this doctrine, two elements must coincide: (1) the challenged action must be too short in duration to be fully litigated prior to its cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again. *Weinstein v. Bradford*, 423 U. S. 147, 149 (1975) (per curiam).

At first glance, it would seem that Hunt fails the second requirement, since there is no reason to believe he will again be arrested on rape charges and denied bail. *Cf. id.* (grant of parole). However, an alternative ground for the holding in *Nebraska Press Association v. Stuart*, 427 U. S. 539 (1976), suggests that the possibility of a new trial after direct appeal is sufficient to maintain a live controversy with respect to pretrial procedures. In *Nebraska Press*, the petitioners sought to overturn a state district court's pretrial order restraining publication of confessions or admissions by the defendant in a criminal trial. The court rejected the argument that the case became moot when the jury was impaneled and the order was lifted. There, as here, the defendant's direct appeal from his conviction was pending. This brought the case under the "capable of repetition, yet evading review" rule:

> [I]f Simants' conviction is reversed by the Nebraska Supreme Court and a new trial ordered, the District Court may enter another restrictive order to prevent a resurgence of prejudicial publicity before Simants' retrial.

Id. at 546.[4]

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4 In fact, the Nebraska Supreme Court vacated Simants' conviction and ordered a new trial. *Simants v. State*, 202 Neb. 828, 277 N. W. 2d 217 (1979).

If the Nebraska Supreme Court reverses Hunt's three convictions and orders new trials, Hunt will again be in the position where his liberty pending trial could be restrained by refusal to set bail. Under the circumstances we hold the section 1983 action is not now moot.[5] *Cf. Powers v. Schwartz*, 587 F. 2d 783 (5th Cir. 1979) (petition for habeas corpus challenging Florida's refusal to allow bail for persons accused of crimes punishable by life imprisonment; case moot upon plaintiff's conviction).

Another concern with respect to the presence of a case or controversy relates to Hunt's concession of factual proof made in Douglas County District Court that the proof was evident and the presumption great. If the district court had found to the contrary, Hunt would have been eligible for release on bail.

Article III requires the existence of a "case or controversy" between two genuinely adverse parties. We are instructed not to reach the merits of a case when a party has failed to demonstrate sufficient standing, or where it is clear that there is no actual dispute because only one party or interest is before the court. In *United States*

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5 Hunt's counsel estimates that review in the Nebraska Supreme Court will not be completed until late 1981 or early 1982. If even one of his three convictions is affirmed, we recognize the case could become moot at that time, since pretrial release on bail would no longer be possible.

Possible alternatives for obtaining review of the constitutionality of this statute would be to claim damages for the refusal to set bail, or to file a class action, see *Sosna v. Iowa*, 419 U. S. 393 (1975); *Gerstein v. Pugh*, 420 U. S. 103, 110 n. 11 (1975); *United States Parole Commission v. Geraghty*, 445 U. S. 388 (1980). Hunt did not pray for damages, nor did he seek to have a class certified.

v. Johnson, 319 U. S. 302 (1943), a landlord sought to invalidate the rent controls in the Emergency Price Control Act of 1942. To do so, he requested that his tenant bring an action under the Act seeking treble damages for excessive rent. The landlord controlled the suit and paid for the tenant's counsel. The Court ordered dismissal because of the collusive nature of the suit and the lack of genuinely adverse parties. *See also Moore v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 47 (1971) (agreement between parties); *Lord v. Veazie*, 49 U. S. (8 How.) 250 (1850) (cooperation between plaintiff and defendant to achieve same result). Unlike those cases, the parties in this case are clearly adverse. There is a bona fide dispute as to whether the state can constitutionally designate non-bailable offenses and thereby refuse to set bail for the petitioner.

It is also well settled that no stipulation of the parties or counsel can enlarge the power of the court by allowing it to decide hypothetical or fictitious cases. *Sosna v. Iowa*, 419 U. S. 393, 398 (1975). The fact that the parties reach an agreement by stipulation cannot in itself suffice to provide a binding conclusion that is the basis for judicial review. A court always retains the power to investigate issues or factual conclusions upon which the parties profess agreement. *United States v. Sisson*, 399 U. S. 267, 284-87 (1970); *Poe v. Ullman*, 367 U. S. 497, 501 (1961); *United States v. John J. Felin & Co.*, 334 U. S. 624, 639-40 (1948); *Estate of Sanford v. Commissioner*, 308 U. S. 39, 51 (1939); *Swift & Co. v. Hocking Valley Railway Co.*, 243 U. S. 281, 289 (1917); *In re Weitzman*, 426 F. 2d 439, 454-55 (8th Cir. 1970) (Lay, J., concurring). *Cf. United States v. International Union United Automobile, Aircraft &*

Agricultural Implement Workers, 352 U. S. 567, 592 (1957). However, it is one thing to say that a court is not bound by a stipulation, and quite another to say that a case is "manufactured" simply because there have been stipulations below. The concern in cases like *Swift* and its progeny is avoidance of collusive disputes or attempts to assume facts simply to obtain review of hypothetical questions. Here, the petitioner and the state can hardly be said to be in collusion and are obviously adverse. Hunt has conceded that proof of the crime was evident and the presumption great. Thus, he has stipulated to the factual proof, obviating the need for the state to meet its burden of proof in that regard. Such a concession does not in itself amount to fabrication or collusive action. *See Regents of the University of California v. Bakke*, 438 U. S. 265, 280 n. 14 (1978); *United Public Workers v. Mitchell*, 330 U. S. 75, 93 (1947). There is no contention by the state that Hunt is attempting to "disguise actual facts of record." *Regents of the University of California v. Bakke*, 438 U. S. at 280 n. 14. While it is true the record does not disclose the underlying facts behind the stipulation, that does not mean the stipulation has no basis in fact. It would indeed be anomalous to say that Hunt or the state had to make a record of the facts before they could enter into a stipulation as to their existence. Finally, to urge that the parties may be denied appellate review by stipulating or conceding factual proof would result in longer trials and militate against sound judicial administration. Therefore, we conclude that Hunt's concession does not bar his constitutional challenge. *Cf. Parker v. Roth*, 202 Neb. 850, 278 N. W. 2d 106, *cert. denied*, 444 U. S. 920 (1979).

B. *Younger* Abstention.

There is no reason for the exercise of abstention under *Younger v. Harris*, 401 U.S. 37 (1971).[6] First, the State of Nebraska did not seek abstention in the federal district court and did not argue for it on appeal; in fact, the State expressed an interest in obtaining a federal decision. *See* Letter of March 3, 1981, Nebraska Department of Justice. *Younger* abstention is not jurisdictional in nature, but is an equitable doctrine based upon comity. "[I]f the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system. . . . *Younger* principles of equity and comity do not require this Court to refuse [the State] the immediate [federal] adjudication it seeks." *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 480 (1977) (footnote omitted).

Even if Nebraska asked for abstention, we do not deem it appropriate here. First, at the time of the district court hearing the on-going state proceeding was the criminal prosecution of Hunt. A declaratory judgment that the State cannot decree per se that certain offenses are non-bailable before trial does not interfere wth the state's orderly criminal prosecution of Hunt. Second, federal abstention is premised upon the existence of an opportunity for the federal plaintiff to present his federal

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6 Hunt's failure to exhaust state remedies does not affect his section 1983 action. Exhaustion of state remedies is not a prerequisite to maintaining a section 1983 action. *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974); *McNeese v. Board of Education*, 373 U.S. 668, 671 (1963); *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

claim in the on-going state proceeding. *E.g., Moore v. Sims*, 442 U. S. 415, 430 (1979); *Juidice v. Vail*, 430 U. S. 327, 337 (1977). Hunt's claim that bail has been unconstitutionally denied is no defense to the criminal charge.[7] Furthermore, in Nebraska "[t]he appropriate form of relief from denial of a motion to reduce bail claimed to be excessive is by habeas corpus," *State v. Harig*, 192 Neb. 49, 62, 218 N. W. 2d 884 (1974). Excessive bail claims will not be considered in an appeal to the Nebraska Supreme Court following conviction and sentencing. *Id.; see also State v. Watkins*, 190 Neb. 450, 452-3, 209 N. W. 2d 184, 185-6 (1973). A state petition for habeas corpus would be futile here in light of the decision in *Parker v. Roth*, an identical dispute in all material respects. In sum, Hunt had no effective state court remedies when this suit was filed, he has none now, and can expect none in the future. Before he was convicted, his only remedy was a state habeas proceeding, which was futile. At the present time, he has no forum where he

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7 This point was raised in *Gerstein v. Pugh*, 420 U. S. 103 (1975), where pretrial detainees sought federal relief from Florida procedures that denied them a pretrial hearing. The court agreed that *Younger* did not apply because the injunction "was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution." *Id.* at 108 n. 9. *Cf. O'Shea v. Littleton*, 414 U. S. 488 (1974) (challenge to allegedly racist bail procedures; in dicta, says abstention appropriate to avoid "on-going federal audit of state criminal proceedings"); *Bonner v. Circuit Court*, 526 F. 2d 1331 (8th Cir. 1975) (en banc), *cert. denied*, 424 U. S. 946 (1976). *Compare Conover v. Montemuro*, 477 F. 2d 1073 (3d Cir. 1973) (no *Younger* abstention) *with Parker v. Turner*, 626 F. 2d 1 (6th Cir. 1980) and *Wallace v. Kern*, 520 F. 2d 400 (2d Cir. 1975), *cert. denied*, 424 U. S. 912 (1976) (cases applying *O'Shea*).

can make his claim. If his three convictions are reversed, he must revert back to his futile state habeas remedy. Under these circumstances, we find federal abstention is not warranted.

We conclude the court has jurisdiction to decide this appeal.

II. Constitutionality of Article I, Section 9.

We turn now to the merits of the appeal. The core issue is whether the amendment to Article I, Section 9 of the Nebraska Constitution denying bail to persons charged with "sexual offenses involving penetration by force or against the will of the victim, . . . where the proof is evident or the presumption great" violates the United States Constitution.

A. Applicability of the Eighth Amendment to the State.

First and foremost we recognize the heavy burden a plaintiff must carry to demonstrate constitutional invalidity of a state constitutional provision. A state constitutional provision is the fundamental and organic law of the state and a federal court should be extremely hesitant to overturn it. Principles of federalism require that great deference be shown to a state constitutional provision. Similarly, we must also respect and give deference to a ruling of the Supreme Court of the State of Nebraska in which the court unanimously agreed there were no constitutional deficiencies in the provision. *Parker v. Roth*, 202 Neb. 850, 278 N. W. 2d 106, *cert. denied*, 444 U. S. 920 (1979). Notwithstanding these principles the state recognizes, as it must, that it is still incumbent upon this court to analyze the state law to see if it conflicts with

the federal constitution.[8] If a conflict exists, we have no alternative; it is our judicial responsibility to make the hard decision and declare the constitutional provision invalid. To do otherwise simply out of comity and respect for the people and courts of Nebraska would be to renounce our constitutional obligation.

The first unresolved question we face is whether the excessive bail clause of the eighth amendment controls the actions of the states. Although there is much implied recognition that the bail clause is incorporated in the liberties protected by the fourteenth amendment,[9] no federal court has provided analysis or an authoritative holding that it actually is. We do so now.

We are instructed that the fourteenth amendment protects a right against state action when the right is

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8 Article VI of the Constitution of the United States reads:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

9 In *Schilb v. Kuebel*, 404 U. S. 357, 365 (1971), the Court stated that "[b]ail . . . is basic to our system of law . . . and the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment." *See also Baker v. McCollan*, 443 U. S. 137, 144 n. 3 (1979). The Court cited *Pilkinton v. Circuit Court*, 324 F. 2d 45, 46 (8th Cir. 1963), where this circuit stated: "We take it for granted that . . . the prohibition in the Eighth Amendment against requiring excessive bail must now be regarded as applying to the States. . . ." *See also United States ex rel. Walker v. Twomey*, 484 F. 2d 874, 875 (7th Cir. 1973); *United States ex rel. Goodman v. Kehl*, 456 F. 2d 863, 868 (2d Cir. 1972); *Simon v. Woodson*, 454 F. 2d 161, 165 (5th Cir. 1972).

"fundamental to the American scheme of justice," *Duncan v. Louisiana*, 391 U. S. 145, 149 (1968); "whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty." *Id.* at 150 n. 14. Few could question that the excessive bail clause of the Constitution relates directly to our constitutional concept of ordered liberty.

"[B]ail . . . is basic to our system of law," *Schilb v. Kuebel*, 404 U. S. 357, 365 (1971). As the Supreme Court observed in *Stack v. Boyle*, 342 U. S. 1 (1951):

> This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. . . . To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act.

Id. at 4-6.

> The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. . . . Each defendant stands before the bar of justice as an individual. . . . Each accused is entitled to any benefits due to his good record, and misdeeds or a bad record should prejudice only those who are guilty of them.

Id. at 7-9 (Jackson, J. Concurring).

The protection against excessive bail has a direct nexus to the presumption of innocence, implicitly recognized within the fourteenth amendment. *Cf. In re Winship*, 397 U. S. 358, 362-64 (1970). In addition, excessive

bail is directly related to the sixth amendment, as incorporated into the fourteenth amendment, relating to the effective assistance of counsel. *Stack v. Boyle*, 342 U. S. at 4. *Cf. Bitter v. United States*, 389 U. S. 15, 17 (1967). As succinctly stated by our sister circuit: "The right to be free from excessive bail underlies the entire structure of the constitutional rights enumerated in the Bill of Rights." *United States v. Abrahams*, 604 F. 2d 386, 393 (5th Cir. 1979).[10]

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10 An interesting summary is provided in Justice Story's Commentaries on the Constitution:

> The next amendment is, "Excessive bail shall not be "required; nor excessive fines imposed; nor cruel and unusual punishment inflicted." This is an exact transcript of a clause in the bill of rights, framed at the revolution of 1688. The provision would seem to be wholly unnecessary in a free government, since it is scarcely possible, that any department of such a government should authorize or justify such atrocious conduct. It was, however, adopted as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in England in the arbitrary reigns of some of the Stuarts. In those times, a demand of excessive bail was often made against persons, who were odious to the court and its favorites; and on failing to procure it, they were committed to prison. Enormous fines and amercements were also sometimes imposed, and cruel and vindictive punishments inflicted. Upon this subject Mr. Justice Blackstone has wisely remarked, that sanguinary laws are a bad symptom of the distemper of any state, or at least of its weak constitution. The laws of the Roman kings, and the twelve tables of the Decemviri, were full of cruel punishments; the Porcian law, which exempted all citizens from sentence of death, silently abrogated them all. In this period the republic flourished. Under the emperors severe laws were revived, and then the empire fell.
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> 2 J. Story, Commentaries on the Constitution of the United States, 610-611 (2d ed. 1851).

We hold that the excessive bail clause of the eighth amendment is incorporated into the fourteenth amendment.[11]

B. Interpretation of "Excessive Bail" Clause.

We first turn to the constitutional text. The eighth amendment reads, in pertinent part: "Excessive bail shall not be required . . . ." The language of the clause has its origin in the English Bill of Rights of 1689, 1 W. & M., Sess. 2, c. II, § I(10).[12] *See Carlson v. Landon*, 342 U. S. 524, 545 (1952).

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11 We note that the Supreme Court has held the cruel and unusual punishment clause of the eighth amendment applicable to the states. *Robinson v. California*, 370 U. S. 660 (1962).

12 Ancient English laws defined nonbailable offenses; bail was denied to persons arrested for the death of a man, for offenses in the forest and other offenses customarily nonbailable, and by special command of the Crown. Others were denied bail by discretion of the sheriff. In 1275, the Statute of Westminister the First restricted the sheriff's discretion by means of a statutory listing of bailable and nonbailable offenses.

> Nonbailable were: (1) such prisoners as before were outlawed; (2) those who have abjured the realm; (3) approvers; (4) such as be taken with the manour (*cum manuopere*); (5) those who had broken the King's prison; (6) thieves openly defamed and known; and (7) such as be appealed (accused) by approvers, so long as the approvers be living, if they be not of good fame; (8) such as be taken for houseburning feloniously done; (9) for false money; or (10) for counterfeiting the King's seal; or (11) persons excommunicated, taken at the request of the Bishop; or (12) for manifest offenses; or (13) for treason touching the King himself.
>
> Bailable were: (1) such as be indicted of larceny by official inquests taken by sheriffs or bailiffs; or (2) of light suspicion; or (3) for petit larceny that amounteth not above the value of 12 pence, if they were not ac-

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The state argues that since the express terms of the eighth amendment do not create a "right to bail," but merely forbid "excessive bail," the state may refuse to grant bail without violating the eighth amendment. We recognize that there is logical support and some authority for this argument.[13] Nonetheless, the history of the right to bail, judicial precedent, the fundamental purpose of bail and the language of the clause itself require us to make further inquiry.

We first consider the logic of interpreting the clause to mean that bail may not be "excessive," but may be denied altogether. We find ourselves in agreement with the Second Circuit's cogent observation: "we perceive no constitutional distinction between requiring excessive bail and denying bail altogether *in the absence of legitimate*

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cused (*rette*) of other larceny aforetime; or (4) accused (*rette*) of receipt of felons; or of commandment, or force, or of aid of felony done; or (5) accused (*rette*) of other trespass, for which a man shall not lose life nor limb; and (6) a man appealed (accused) by an approver after the death of the approver, if he be no openly defamed thief. 3 Edw. 1, c. 15 (1275).

Meyer, *Constitutionality of Pretrial Detention, Part I,* 60 Geo. L. J. 1140, 1154 n. 93 (1972).

Difficulties in securing release on bail led to the Petition of Right of 1628, but there was no effective mechanism to force timely setting of bail and release. This prompted passage of the Habeas Corpus Act of 1679, which could be used to force the setting of bail. It did not, however, prevent the setting of bail at unreasonably high levels. To close this loophole, the Bill of Rights of 1689 declared "that excessive bail ought not to be required." *See generally* Meyer, *supra* at 1151-57, 1180-90; Duker, *The Right to Bail: A Historical Inquiry,* 42 Albany L. Rev. 33, 34-66 (1977).

13 *See generally Duker, supra* n. 12; Meyer, *supra* n. 12.

reasons." United States ex rel. Goodman v. Kehl, 456 F. 2d 863, 868 (2d Cir. 1972) (emphasis added). Similarly, Mr. Justice Burton, writing in dissent in *Carlson v. Landon,* observed:

> [The] Amendment clearly prohibits federal bail that is excessive in amount when seen in the light of all traditionally relevant circumstances. Likewise, *it must prohibit unreasonable denial of bail.* The Amendment cannot well mean that, on the one hand, it prohibits the requirement of bail so excessive in amount as to be unattainable, yet, on the other hand, under like circumstances, it does not prohibit the denial of bail, which comes to the same thing. The same circumstances are relevant to both procedures.

342 U. S. at 569 (emphasis added).[14]

If the eighth amendment has any meaning beyond sheer rhetoric, the constitutional prohibition against excessive bail necessarily implies that unreasonable denial of bail is likewise prohibited. Logic defies any other resolution of the question.

This does not necessarily mean that a court cannot refuse to set bail in some cases. Pretrial release is a

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14 Mr. Justice Butler, acting as circuit justice, in allowing bail in *United States v. Motlow,* 10 F. 2d 657 (7th Cir. 1926), an appeal following a conviction under the National Prohibition Act, stated:

> The Eighth Amendment provides that "excessive bail shall not be required." This implies, and therefore safeguards, the right to give bail at least before trial. The purpose is to prevent the practical denial of bail by fixing the amount so unreasonably high that it cannot be given. The provision forbidding excessive bail would be futile if magistrates were left free to deny bail.

Id. at 659.

recognition of the individual's interest in obtaining freedoom prior to any finding of guilt. Society also has certain interests that are balanced against the individual's desire for release. Foremost among these interests is society's desire to obtain assurances that the accused will appear for trial and submit to sentencing. As the Court wrote in *Stack v. Boyle*, 342 U. S. at 4-5:

> The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. *Ex parte Milburn*, 9 Pet. 704, 710 (1835). Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" under the Eighth Amendment. See *United States v. Motlow*, 10 F. 2d 657 (1926, opinion by Mr. Justice Butler as Circuit Justice of the Seventh Circuit).
>
> Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.[15]

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15 *See also United States v. Smith*, 444 F. 2d 61, 62 (8th Cir. 1971), *cert. denied*, 405 U. S. 977 (1972) ("The primary purpose of bail is to allow an accused person not yet tried to be free of restraint while at the same time insuring that person's presence at the pending court proceedings."); *White v. United States*, 330 F. 2d 811, 814 (8th Cir.), *cert. denied*, 379 U. S. 855 (1964); *Forest v. United States*, 203 F. 2d 83, 84 (8th Cir. 1953); *United States v. Beaman*, 631 F. 2d 85, 86 (6th Cir. 1980); *Pugh v. Rainwater*, 572 F. 2d 1053, 1057 (5th Cir. 1978) (en banc); *United States v. Wright*, 483 F. 2d 1068, 1069 (4th Cir. 1973); *United States v. Bobrow*, 468 F. 2d 124, 127 n. 16 (D. C. Cir. 1972).

We ordinarily determine whether bail in a particular case is "excessive" by considering whether the amount corresponds to the state's interests under the particular circumstances of the case. If the bail is higher than is necessary to meet the state's legitimate objectives, it is excessive. We recognize that there may be instances where no amount of bail can sufficiently protect the state's interests. In such a case, a court may consider the relevant factors and deny bail. *See, e.g., United States v. Abrahams*, 575 F. 2d 3 (1st Cir.), *app'l for bail denied*, 436 U. S. 902, *cert denied*, 439 U. S. 821 (1978) (denying bail where accused had forfeited a $100,000 bond in the past and "lived a life of subterfuge, deceit and cunning."). However, it is quite another thing to say that the eighth amendment would permit outright denial of bail without consideration of the factors relevant to an individual's suitability for pretrial release; at least in the eyes of the accused, an unreasonable and arbitrary *denial* of bail is surely the equivalent to an unobtainably high amount of bail that is set unreasonably and arbitrarily.

The State argues, however, that nothing within the eighth amendment prohibits a *legislative* (as opposed to a judicial) denial of bail in a certain class of cases. The Supreme Court of Nebraska accepted this argument:

> Once a recognition that legislative bodies had the right to exclude murder, treason, or capital offenses from bail is made, one is left with the inescapable conclusion that the Eighth Amendment simply prohibited excessive bail *where* allowed and did not guarantee the right to bail in every instance.

Parker v. Roth, 278 N. W. 2d, at 111.

In considering this view, we observe first that it suffers from the same logical flaw as the argument just discussed.

If legislative bodies are free to define any and all offenses as nonbailable, they may deprive the amendment of any force and accused persons of any protection. We agree with Justice Black that to conclude that "the Amendment does no more than protect a right to bail which . . . Congress can take away . . . reduce[s] [it] below the level of a pious admonition." *Carlson v. Landon*, 342 U. S. at 556 (dissenting opinion). This indeed is a "devitalizing interpretation." *Id.*

The state urges that English history supports the concept of legislative denial of bail, since Parliament recognized certain offenses were nonbailable and others were subject to reasonable bail. *See* Duker and Meyer, *supra* note 12.

In construing the Constitution, an analysis of English common law and its adaption in the colonies can be relevant in determining the intent of the framers.[16] However, the overall history of the bail clause does not necessarily support the conclusion advanced by the state. The fact that Parliament classified certain offenses as nonbailable is not an absolute indication that Congress was to enjoy the same power to define bailable and nonbailable offenses. Our Congress operates under the limits imposed by the Constitution. England, of course, had no constitution.[17]

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16 *See, e. g., United States v. DiFrancesco*, 101 S. Ct. 426, 435-36 (1980); *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814, 2821-26 (1980); *Payton v. New York*, 445 U. S. 573, 591-98 (1980); *Gannett Co. v. DePasquale*, 443 U. S. 368, 384-91 (1979); *Nevada v. Hall*, 440 U. S. 410, 414-20 (1979); *Williams v. Florida*, 399 U. S. 78, 90-100 (1970).

17 *Compare United States v. Brewster*, 408 U. S. 501, 508 (1972):

> Although the Speech or Debate Clause's historic roots are in English history, it must be interpreted in

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The Constitution was our assurance that many of the abuses suffered under English rule would not be passed on to our people. As the Supreme Court recognized 30 years ago, quoting Stansbury's trial of James H. Peck:

> At the Revolution we separated ourselves from the mother country, and we have established a republican form of government, securing to the citizens of this country other and greater personal rights, than those enjoyed under the British monarchy.

Bridges v. California, 314 U. S. 252, 264 n. 7 (1941).

See also Carlson v. Landon, 342 U. S. at 557 (Black J., dissenting).

Furthermore, there is strong evidence in colonial laws that the American concept of bail differed significantly from English law. Most significant is the early recognition within the colonies that bail was deemed a right of every person except those charged with capital crimes. As early as 1641, the Massachusetts Body of Liberties guaranteed bail in noncapital crimes.[18] This trend in colonial

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light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system. We should bear in mind that the English system differs from ours in that their Parliament is the supreme authority, not a coordinate branch.

18 A series of pre-revolutionary enactments guaranteed that bail would be set in virtually all noncapital crimes. The Massachusetts Body of Liberties declared that all crimes were bailable except capital crimes, contempt in open court, and cases in which the legislature expressly denied bail. Massachusetts Body of Liberties, cl. 18, *reprinted in* 1 B. Schwartz, The Bill of Rights: A Documentary History 71,

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law toward a guarantee of bail in noncapital cases culminated in the Northwest Ordinance of 1787, which stated:

> [A]ll persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great. All fines shall be moderate, and no cruel or unusual punishments shall be inflicted.

An Ordinance for the Government of the Territory of the United States North-west of the River Ohio, Art. II, 22 Journals of the Continental Congress 334 (1787), *reprinted in* 1 Stat. 50 n. (a).

Similar clauses now appear in most state constitutions. *See Petition of Humphrey*, 601 P. 2d 103, 108-11 (Okla. Crim. 1979) (compiling state constitutional provisions).[19]

The state, however, places strong reliance on Mr. Justice Reed's observations in *Carlson v. Landon*, 342 U. S. at 545-46:

> The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases

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73-74 (1971). Similarly, Pennsylvania's Frame of Government of 1682 required bail except for "capital offenses, where the proof is evident or the presumption great." Pennsylvania Frame of Government, cl. XI, *reprinted in* Schwartz at 132, 141. In 1683, New York required bail except for treason or felony. ("[F]elony cases were capital cases at the time", Schwartz at 163). New York Charter of Libertyes & Priviledges, *reprinted in* Schwartz at 163, 166. Virginia's 1785 statute required admission to bail for any crime not punishable in life or limb. Other colonies followed the English pattern set in the Statute of Westminister the First discussed in n. 12, *supra*. *See generally* Foote, *The Coming Constitutional Crisis in Bail*, 113 U. Pa. L. Rev. 959, 974-79 (1965).

19 Michigan is apparently the only other state that has a constitutional provision similar to Article I, § 9 of the Nebraska Constitution. Mich. Const. art. I, § 15.

> bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable.

The state emphasizes that throughout Anglo-American legal history there have been legislative acts denying bail in capital cases. In fact, when the eighth amendment itself was adopted, Congress contemporaneously passed section 33 of the Judiciary Act of 1789, 1 Stat. 73, guaranteeing bail to every accused person except those charged with capital crimes. Thus, it is argued that the framers of the Bill of Rights were well aware that the right to bail could be legislatively denied.

Although we are not confronted with the question, we acknowledge that Congress, and the state legislatures, seemingly possess the power to deny the right to bail to persons charged with capital crimes. It is argued that from this premise we must conclude that a legislative body may also deny the right to bail in any or all noncapital cases. However, the syllogism is not complete. First, as discussed, there is a historical basis for the capital crimes exception; there is no similar historical basis for a legislative denial in noncapital cases. In fact, colonial practice suggests to the contrary. Second, the concept of denial of bail in capital cases is at least arguably consistent with one of the purposes of bail. As previously set forth, traditionally the fundamental and sole purpose of bail before conviction was to provide reasonable assurance the accused would appear for trial and sentencing if convicted. The Ninth Circuit recently observed that state courts have found that statutes denying bail to defendants charged with capital offenses were "enacted because it had been thought that most defendants facing a possible death pen-

alty would likely flee regardless of what bail was set, but that those facing only a possible prison sentence would not if bail were sufficiently high." *United States v. Kennedy*, 618 F. 2d 557, 559 (9th Cir. 1980).

Blackstone's Commentaries observed in 1770:

> [the accused] must either be committed to prison, or give bail; that is, put in securities for his appearance, to answer the charge against him. This commitment therefore being only for safe custody, wherever bail will answer the same intention, it ought to be taken; as in most of the inferior crimes: but in felonies, and other offences of a capital nature, no bail can be a security equivalent to the actual custody of the prison. For what is there that a man may not be induced to forfeit, to save his own life? and what satisfaction or indemnity is it to the public, to seize the effects of them who have bailed a murderer, if the murderer himself be suffered to escape with impunity?

4 W. Blackstone, Commentaries on the Laws of England 293-94 (4th Ed. 1770).

In dealing with noncapital offenses there exists no similar rational and relevant concern. In noncapital crimes without balancing at least the individual factors of the particular case there exists no equally strong compulsion to conclude that an accused will not appear for trial.

Certainly the eighth amendment would prohibit Congress from arbitrarily decreeing that all persons arrested for possession of an illegal weapon or a proscribed drug must give security by a $1,000,000 bond. We think few courts would have difficulty finding that such a law would not pass muster under the excessive bail clause. If a $1,000,000 bond set arbitrarily by legislative fiat is excessive there is little logic to support the proposition that

Congress could arbitrarily deny bail for any or all criminal charges whatsoever. The point is, we agree, Congress and the states may reasonably legislate as to the right to bail for certain offenses "provided the power is exercised rationally, reasonably, and without discrimination."[20]

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20 We agree with the analysis made by Judge Weinfeld writing in *United States ex rel. Covington v. Coparo*, 297 F. Supp. 203 (S. D. N. Y. 1969) where he observed:

> However, Congress could, without running afoul of the Eighth Amendment, also provide, for example, that persons accused of kidnapping, bank robbery with force and violence, or other serious noncapital crimes are not entitled to bail as a matter of right. This Congressional power, of course, is confined by the due process clause of the Fifth Amendment. Thus, I am of the view that Mr. Justice Burton, in his dissent in Carlson v. Landon, correctly defined the scope of the Eighth Amendment to "prohibit . . . federal bail that is excessive in amount when seen in the light of all traditionally relevant circumstances. Likewise, it must prohibit unreasonable denial of bail."
>
> And as Congress is free, within constitutional limits, to define the classes of crimes which are bailable as a matter of right and those that are not, so, too, may the state legislatures. While the Supreme Court has not passed upon the direct issue, those federal courts which have are in accord that the Eighth and Fourteenth Amendments do not require the state to grant bail in all cases as a matter of right; all have recognized that a state may constitutionally provide that bail be granted in some cases as a matter of right and denied in others, *provided that the power is exercised rationally, reasonably and without discrimination.* Thus, *it is left to the courts to fix the amount of bail in all cases where it is a matter of right and also in those instances where the court exercises its discretion favorably;* but, under the Eighth Amendment, where bail is fixed in either instance, it must not be excessive, and further, where bail *is not a matter of right, the court may not arbitrarily or unreasonably deny bail.*

Id. at 206 (emphasis added).

Lastly, we turn to judicial precedent.

It is urged that *Carlson v. Landon*, relied upon by the Nebraska Supreme Court, has settled the issue favorably to the state. We disagree; *Carlson*, in our judgment, provides at least implicit support for striking down the Nebraska amendment.[21]

Carlson involved the discretionary denial of bail by the Attorney General for alien communists facing deportation. On its face, *Carlson* may not be controlling here since it did not involve persons accused of crime, the traditional concern of the bail clause. Nevertheless, we deem it significant that the Supreme Court upheld the denial of bail under the Internal Security Act, solely on the grounds that Congress had provided the Attorney General with discretion to grant or deny bail. Significantly, with respect to aliens facing deportation proceedings, his discretion was subject to judicial review. The Supreme Court observed:

> A wide range of discretion in the Attorney General as to bail is required to meet the varying situations arising from the many aliens in this country.

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21 The state also urges that this court's opinion in *Mastrian v. Hedman*, 326 F. 2d 708 (8th Cir.), *cert. denied*, 376 U. S. 965 (1964), which was also cited extensively by the Nebraska Supreme Court, supports its view that the state may refuse to make provision for a right to bail. We, of course, do not argue with that proposition. Our concern is that such a denial must be based on reasoned factors relevant to the purpose of bail. *Mastrian* was an "excessive bail" case and did not involve an attempt by the state to deny bail for certain crimes. Furthermore, we note the opinion is an administrative order by two judges denying a certificate of probable cause to proceed on appeal in a habeas corpus case. The administrative order affords little precedential value.

> The policy and standards as to what aliens are subject to deportation are, in general, clear and definite. 8 U. S. C. §§ 137 and 155. Specifically when dealing with alien Communists, as in these cases, the legislative standards for deportation is definite. See notes 3 and 4, *supra*. ***In carrying out that policy the Attorney General is not left with untrammeled discretion as to bail.*** Courts review his determination. Hearings are had, and he must justify his refusal of bail by reference to the legislative scheme to eradicate the evils of Communist activity.

342 U. S. at 543 (emphasis added).

In *Carlson* the court of appeals in fact earlier had remanded to the district court one of the individual cases since the government had not based the Attorney General's denial on relevant factors relating to the necessity of pretrial detention.[22] Significantly, the Supreme Court stated:

> In fact, a report filed with this Court by the Department of Justice in this case at our request shows allowance of bail in the large majority of cases. *The refusal of bail in these cases is not arbitrary or capricious or an abuse of power.*

Id. at 542 (emphasis added).

Thus *Carlson* recognized that where the Attorney General exercised judgmental discretion, denial of bail could not

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22 The Court of Appeals explained that the order was reversed and remanded to the district court because the Director:

> [M]ust state some fact upon which a reasonable person could logically conclude that the denial of bail is required to protect the country or to secure the alleged alien's presence for deportation should an order to that effect be the result of the hearing.

Carlson v. Landon, 186 F. 2d 183, 189 (9th Cir. 1950).

be based on arbitrary standards. In concluding the eighth amendment did not prevent denial of bail, the Court carefully stated:

> We think, clearly, here that the Eighth Amendment does not require that bail be allowed *under the circumstances of these cases.*

Id. at 546 (emphasis added).

C. *The Nebraska Procedures.*

We turn now to the question of whether the Nebraska constitutional amendment constitutes an unreasonable and arbitrary denial of bail violating the excessive bail clause of the eighth amendment. We conclude that it does.

Under the challenged state procedures, bail *must* be denied to every person charged with "sexual offenses involving penetration by force or against the will of the victim" where the "proof is evident or the presumption great." Once the charge is made and it is determined that the proof is evident, no other relevant factor is weighed and no standards relevant to the purpose of assuring the presence of the defendant are considered. No discretion is vested in any judicial officer to grant or to deny bail. The only circumstance where bail might possibly be granted is where the judicial officer determines the proof is *not* evident or the presumption is *not* great.[23] This criterion, however, bears little relevance to the factors ordinarily used to determine whether bail should be granted or denied in an individual case. As earlier indicated, the right to release before trial is traditionally

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23 This determination is by summary proceeding to which the rules of evidence are not applicable. 2A Neb. Rev. Stat. § 27-1101 (4) (b).

based upon reasonable conditions to provide "adequate assurance" that the accused will stand trial and submit to sentence if found guilty. Release upon reasonable conditions of bail thus serves to preserve the presumption of innocence by preventing infliction of punishment before trial. *Stack v. Boyle*, 342 U. S. at 4-5; *Hudson v. Parker*, 156 U. S. 277, 285 (1895). The state does not contend that an absolute denial of bail to all persons charged with forcible rape is rationally related or necessary to assuring their appearance at trial. In noncapital cases there exists no empirical basis for an assumption that all persons charged will not appear for trial once appearance is conditioned upon reasonable bail.

The state urges, however, that it may permissibly view the crime of first degree sexual assault as a heinous crime distinct from other crimes and that "the welfare of society demands that persons charged with this crime should not be afforded pretrial release." *Cf. Coker v. Georgia*, 433 U. S. 584 (1977). There is little need to demonstrate at length the seriousness of the crime of rape. No one can deny society's continuing concern for preventing the occurrence of such offenses and exercising every legitimate effort to punish those who commit the crime. But punishment for any crime before trial and proper conviction is alien to our legal system and constitutes a denial of due process. *Bell v. Wolfish*, 441 U. S. 520 (1979).[24] Thus, it is plain that accused persons can-

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24 In *Bell v. Wolfish* the Court observed:

> A person lawfully committed to pretrial detention has not been adjudged guilty of any crime. He has had

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not be held with the intention of punishing them, and the state does not claim it has such a purpose. The only other purpose conceivably served is protecting society from these persons. This argument rests on the assumption that all persons accused of first degree sexual offenses in Nebraska, where there is a preliminary finding of evident proof of the offense, pose a danger to the community by inclination to commit similar offenses.

There has long been legal debate as to whether bail may be denied where the judicial officer finds that *the individual* poses a danger to the community.[25] Preventive detention is officially recognized in the federal system only in the District of Columbia. D. C. Code Ann. §§ 23-1321 to 23-1322. *See Blunt v. United States*, 322 A. 2d 579 (D. C. App. 1974). However, even under this legisla-

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only a "judicial determination of probable cause as a prerequisite to [the] extended restraint of [his] liberty following arrest." *Gerstein v. Pugh, supra,* at 114; *see Virginia v. Paul,* 148 U. S. 107, 119 (1893). And, if he is detained for a suspected violation of a federal law, he also has had a bail hearing. See 18 U. S. C. §§ 3146, 3148. Under such circumstances, the Government concededly may detain him to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution.

441 U. S. at 536-37.

25 *Compare* Hruska, *Preventive Detention: The Constitution and the Congress,* 3 Creighton L. Rev. 36 (1969); Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention,* 55 Va. L. Rev. 1223 (1969) *with* Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell,* 56 Va. L. Rev. 371 (1970); Hickey, *Preventive Detention and the Crime of Being Dangerous,* 58 Geo. L. J. 287 (1969); Note, *Preventive Detention: An Empirical Analysis,* 6 Harv. C. R.-C. L. L. Rev. 289 (1971).

tion, an *individual* is afforded procedural safeguards and the government must prove that *the individual's* behavior presents a risk to the community.

The federal courts have traditionally held, consistent with *Stack v. Boyle*, that under the eighth amendment and the federal bail statute, the only relevant factor is the likelihood that the defendant will appear for trial. *See* note 15, *supra*.[26] Several courts have, however, indicated that danger to the community may be considered when setting bail. *See Carlson v. Landon*, 342 U. S. at 538; *Carbo v. United States*, 82 S. Ct. 662, 666 (1962) (Douglas Circuit J.); *United States v. Wind*, 527 F. 2d 672 (6th Cir. 1975); *United States ex rel. Covington v. Coparo*, 297

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26 In the passage of the Bail Reform Act of 1966, 18 U. S. C. §§ 3146-52, the Senate and House Reports reflect historical concerns negating danger to the community as a relevant factor in denying pretrial release.

The Senate report states:

> The bill is not intended to deal with the problem of preventive detention of an accused because of the possibility that his liberty might endanger the public welfare, either because of the accused's predisposition to commit further acts of violence during the pretrial period, or because of the likelihood that his freedom might result in the intimidation of witnesses or the destruction of evidence. S. Rep. No. 750, 89th Cong., 1st Sess. 5 (1965).

The House report contains language to the same effect, and adds:

> It must be remembered that under American criminal jurisprudence pretrial bail may not be used as a device to protect society from the possible commission of additional crimes by the accused. H. R. Rep. No. 1541, 89th Cong., 2d Sess. 6 (1966).

Allen v. United States, 386 F. 2d 634, 640 n. 10 (D. C. Cir. 1967).

F. Supp. 203, 207 (S.D. N.Y. 1969); *Wansley v. Wilkerson*, 263 F. Supp. 54, 57 (W.D. Va. 1967). *But see United States v. Beaman*, 631 F. 2d 85, 87 (6th Cir. 1980); *United States v. Bigelow*, 544 F. 2d 904 (6th Cir. 1976) (*Wind* restricted to threats to witnesses); *United States v. Leathers*, 412 F. 2d 169, 171 (D.C. Cir. 1969). There are also several cases suggesting that the court may deny bail in order to protect its own processes, such as in cases where an accused has threatened witnesses. *Carbo v. United States*, 82 S. Ct. at 668-69; *United States v. Smith*, 444 F. 2d 61, 62 (8th Cir. 1971), *cert. denied*, 405 U.S. 977 (1972). *United States v. Bigelow*, 544 F. 2d at 907-08; *Gavino v. MacMahon*, 499 F. 2d 1191, 1195 (2d Cir. 1974); *Nail v. Slayton*, 353 F. Supp. 1013, 1019-20 (W.D. Va. 1972). *Cf. Martin v. State*, 517 P. 2d 1389 (Alaska 1974); *In re Underwood*, 9 Cal. 3d 345, 508 P. 2d 721 (1973); *Commonwealth v. Truesdale*, 449 Pa. 325, 296 A. 2d 829 (1972) (courts holding that state constitutions guarantee bail and prevent pretrial detention based on dangerousness).

On the record before us, however, we need not decide whether discretionary pretrial release of an individual may be denied after a finding that release would create a danger to the community. It is sufficient to observe that the Nebraska procedures provide for no inquiry into the dangerousness of the individual, and no such finding appears in the record of this case. Instead, Nebraska has made a legislative determination that an entire class of accused persons is not entitled to bail. We are aware of no decision, with the exception of *Parker v. Roth*, including *Carlson*, that has sanctioned legislative denial of bail to all persons based solely on the noncapital offense

charged. Instead, every determination involving bail in noncapital cases involves the balancing of particularized factors of the individual case. The factors to be weighed by a judicial officer include the nature and circumstances of the offense charged, the accused's family ties, employment, financial resources, character and mental condition, the length of the residence in the community, the record of prison convictions and the record of appearance at court proceedings or flight to avoid prosecution. *See, e. g.*, 18 U. S. C. § 3146 (b); 2A Neb. Rev. Stat. § 29-901.01. And assuming, arguendo, that the danger to the community is also a relevant factor, the individual factors just recited must be weighed along with the overall background and known propensities of the individual before it can be reasonably determined that such individual poses such a threat to the community that bail must be denied. A judicial officer who is legislatively denied discretion to consider these factors is required arbitrarily to deny every defendant the right to bail based solely on the particular crime charged.

We do not hold and need not decide that there is a constitutional right in every case to release on bail. As we have discussed, there exists a strong argument that bail may be properly denied without encroaching on constitutional concerns where a judicial officer weighs all the appropriate factors and makes a reasoned judgment that the defendant's past record demonstrates that bail will not reasonably assure his or her appearance or, arguendo, that he or she, because of the overall record and circumstances, poses a threat to the community. The fatal flaw in the Nebraska constitutional amendment is that the state has created an irrebuttable presumption that every individual

charged with this particular offense is incapable of assuring his appearance by conditioning it upon reasonable bail or is too dangerous to be granted release.[27] The constitutional protections involved in the grant of pretrial release by bail are too fundamental to foreclose by arbitrary state decree. The state may be free to consider the nature of the charge and the degree of proof in granting or denying bail but it cannot give these factors conclusive force. *Cf.* L. Tribe, American Constitutional Law 1095-96 (1978).[28]

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27 In Hunt's brief, his attorney refers to a study contained in the record conducted by the Douglas County Public Defender's Office after this provision had been in effect for one year. It found that 32 defendants had been denied bail during the year. Twenty-two of these cases had reached final trial court disposition when the figures were compiled. Of these 22 defendants, only two were convicted of forcible first-degree sexual assault. Two others were acquitted and three had their prosecutions dismissed. The rest were either convicted of or entered guilty pleas to lesser bailable charges of sexual offenses or nonsexual offenses. While we do not base our conclusions on this study, it does illustrate the danger of making pretrial assumptions about the likelihood of conviction or the danger posed to the community by a class of individuals.

28 We find guidance in the Supreme Court's decisions under the eighth amendment holding that mandatory death penalty requirements are unconstitutional. We recognize, of course, that the decision to impose a death penalty raises questions not posed here. In both situations, however, the state has enacted provisions preventing consideration of individual circumstances in the administration of criminal justice. In *Woodson v. North Carolina*, 428 U. S. 280 (1976), Justice Stewart wrote:

> A third constitutional shortcoming of the North Carolina statute is its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death. In *Furman*,

(Continued on next page)

As Mr. Justice Murphy once wrote in another context: "[T]o . . . justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for the deprivation of rights." *Korematsu v. United States*, 323 U. S. 214, 240 (1944) (dissent).

We hold, therefore, that the portion of Article I, section 9 of the Nebraska Constitution denying bail to persons charged with certain sexual offenses violates the eighth amendment of the United States Constitution, as incorporated in the fourteenth amendment. Accordingly, we reverse the district court's dismissal of the complaint and remand for issuance of a declaratory judgment in accordance with this opinion. The plaintiff has also prayed

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(Continued from previous page)

members of the Court acknowledged what cannot fairly be denied—that death is a punishment different from all other sanctions in kind rather than degree. See 408 U. S., at 286-291 (Brennan, J., concurring); *id.*, at 306 (Stewart, J., concurring). A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Id. at 303-04.

In comparison, statutes allowing imposition of the death penalty have withstood eighth amendment challenge where the court is directed to consider "the particularized nature of the crime and the particularized characteristics of the individual defendant." *Gregg v. Georgia*, 428 U. S. 153, 206 (1976). *See also Jurek v. Texas*, 428 U. S. 262 (1976); *Proffitt v. Florida*, 428 U. S. 242 (1976). *Cf. Godfrey v. Georgia*, 446 U. S. 420, 427-28 (1980).

for an injunction restraining future application of this portion of the Nebraska Constitution. We see no need for the issuance of an injunction. *See Roe v. Wade*, 410 U. S. 113, 166 (1973). The appeal from the denial of the writ of habeas corpus is dismissed as moot.

ARNOLD, Circuit Judge, dissenting.

Because I believe that this case has been moot since Hunt was convicted of first-degree forcible sexual assault on September 10, 1980, and that we should not permit the parties, by means of a stipulation without basis in the record, to force us to decide an important question of federal constitutional law, I respectfully dissent from Part I-A of the Court's opinion. It is unnecessary for me to express a view on the other issues discussed by the Court.

First. A decision that Article I, § 9, of the Constitution of Nebraska violates the Excessive Bail Clause of the Eighth Amendment to the Constitution of the United States is of absolutely no use to Eugene L. Hunt. Pretrial bail no longer means anything to Hunt. He has been convicted on two charges of first-degree forcible sexual assault and one charge of first-degree sexual assault on a child. He is in jail because of these three convictions and will remain there despite this Court's acceptance of his claim under the Eighth Amendment. Only if all three of Hunt's convictions are reversed, will such a holding have any significance for Hunt as an individual. What the likelihood of such a triple reversal might be, we have no way of knowing, since this record contains no hint of the facts relevant to Hunt's guilt or innocence.[1] The possibility

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1 Since Hunt's lawyer has stipulated that, as to him, the proof of guilt is evident, or the presumption great, it seems likely that if any of his convictions is reversed, it will be on some ground unrelated to guilt or innocence.

of three reversals is wholly speculative. They could come about, but one may be pardoned, I hope, for doubting it.

I do not read *Nebraska Press Ass'n v. Stuart*, 427 U. S. 539, 546-47 (1976), as holding that the possibility that Hunt's convictions might be reversed prevents this case from being moot. It is true that one reason given by the Supreme Court for not dismissing the case as moot was that Simant's conviction might be reversed by the Supreme Court of Nebraska, and a new trial ordered. But I think the case does not hold that this circumstance alone prevents mootness. In other words, the possibility that the conviction might be reversed is not, in my view, a true alternative holding, a ground upon which the Court would have reached the result even if the other reason for rejecting the suggestion of mootness had not been present. The case involved not merely the rights of Simants, but the rights of all news media covering criminal trials in the State of Nebraska. The likelihood that the controversy would be repeated in some state trial court, to the detriment of the Nebraska Press Association, the party actually before the Court, whether or not Simant's conviction was affirmed, was thus overwhelming.

The Supreme Court's citation of *Weinstein v. Bradford*, 423 U. S. 147 (1975) (per curiam), in *Nebraska Press Ass'n, supra*, 427 U. S. at 547, reinforces this conclusion. In *Weinstein* petitioner sued the members of the North Carolina Board of Parole, claiming that they were obligated under the Due Process Clause of the Fourteenth Amendment to accord him certain procedural rights in considering his eligibility for parole. After the case had been decided in the Court of Appeals, plaintiff was paroled and completely released from supervision. The Supreme

Court held that the case was moot. It distinguished *Southern Pacific Terminal Co. v. I. C. C.*, 219 U. S. 498 (1911), the first case to enunciate the "capable of repetition, yet evading review" branch of the law of mootness, on the ground that in *Southern Pacific* "the same party would in all probability be subject to the same kind of order in the future. . . ." 423 U. S. at 149. "[T]here is no demonstrated probability that [plaintiff] . . . will again be among" the class of persons subject to the challenged parole procedures. *Ibid.* Application of the "capable of repetition, yet evading review" doctrine was limited to cases in which "there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Ibid.*

Nebraska Press Ass'n cites *Weinstein* without any kind of qualification, and without any explicit acknowledgment that a new or different rule of mootness is being announced. A rule that the mere possibility of reversal of a conviction prevents the case from becoming moot would certainly be a different rule from that stated in *Weinstein*. I therefore conclude that the *Nebraska Press Ass'n* opinion should be interpreted as resting upon the concurrence of two circumstances: the possibility of reversal of the conviction, and the likelihood that members of the Press Association would again, in some trial court, be subjected to the challenged restrictions on their activities.

Second. As to the stipulation that, in Hunt's case, the proof was evident and the presumption great, it is hard not to view it as an effort by the parties to manipulate the federal courts into deciding a constitutional question. The cases are legion admonishing the federal courts not to reach constitutional questions unnecessarily, and I

would apply this maxim here. The concurring opinion in *In re Weitzman*, 426 F. 2d 429, 455 (8th Cir. 1970) (Lay, J.), is a strong statement of this concern. That case involved not a stipulation, but simply the failure of Mrs. Weitzman to pursue on appeal an argument she had unsuccessfully raised in the trial court. Here, just as in *Weitzman*, the parties tender a constitutional question for decision, when the resolution of an antecedent question of fact, which they have attempted to leave out of the case, could make constitutional adjudication unnecessary. I agree that the parties in this case are genuinely adverse on the merits. I do not agree that they can compel us to reach a constitutional question. If there were facts in this record from which we could conclude whether indeed the proof was evident, or the presumption great, I would go ahead and reach that question, as Judge Lay did in his concurring opinion in *Weitzman*, and as the Supreme Court did in *Swift & Co. v. Hocking Valley Ry.*, 243 U. S. 281 (1917). This record, however, so far as I know, is devoid of proof on the question, so the proper remedy should be to dismiss the complaint for want of justiciability.

A situation similar in some respects was presented in *Naim v. Naim*, 350 U. S. 891 (1955) (per curiam), where the Supreme Court declined to rule on a federal constitutional question in part because of "the failure of the parties to bring here all questions relevant to the disposition of the case. . . ." *Ibid.*

Both sides urge us to overcome these doubts and reach the merits. But jurisdiction cannot be conferred by consent, least of all in constitutional matters. The federal courts have an institutional interest of their own in scrupu-

lously confining their power to strike down legislation to those cases where exercise of the power is safely within the traditional judicial function to decide cases affecting substantial rights of real people. If this were such a case, I should be as quick as any to meet the issue. But here the likelihood that our holding will mean anything to the named party challenging the state constitutional provision is so attenuated, and the question presented so abstract, that I would refrain from adjudicating the merits, not out of timidity, but out of discretion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIVIL NO. 80-0-361

MEMORANDUM

EUGENE L. HUNT,

Petitioner,

vs.

RICHARD ROTH, SHERIFF OF DOUGLAS COUNTY, NEBRASKA; and JOSEPH VITEK, WARDEN, DOUGLAS COUNTY CORRECTIONS CENTER, and DIRECTOR, DOUGLAS COUNTY DEPARTMENT OF CORRECTIONS,

Respondents,

and

THE STATE OF NEBRASKA,

Intervenor.

CIVIL NO. 80-0-377

MEMORANDUM

(Filed October 17, 1980)

EUGENE L. HUNT,

Plaintiff,

vs.

JAMES M. MURPHY, DISTRICT JUDGE OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF NEBRASKA, DOUGLAS COUNTY NEBRASKA,

Defendant.

APPEARANCES:

For Petitioner-Plaintiff—
Bennett G. Hornstein,
Asst. Douglas County Public Defender,
Omaha, Nebraska

For Respondents-Intervenor-Defendant—
Paul L. Douglas,
Nebraska Attorney General,
Lincoln, Nebraska

Terry R. Schaaf,
Asst. Nebraska Attorney General,
Lincoln, Nebraska

Rockford G. Meyer,
Deputy Douglas County Attorney,
Omaha, Nebraska

DENNEY, District Judge

Before the Court for its consideration are two consolidated cases, both of which were initiated by Eugene L. Hunt. Civil No. 80-0-361 is a habeas corpus case filed pursuant to 28 U. S. C. § 2254. Civil No. 80-0-377 is a civil rights case filed pursuant to 42 U. S. C. § 1983 and 28 U. S. C. § 1343. Both actions involve the constitutionality of the 1978 bail amendment to Article I, section 9 of

the Constitution of the State of Nebraska (1978 bail amendment).[1]

The operative facts of these cases are uncontroverted. The petitioner-plaintiff, Eugene L. Hunt (Hunt), presently faces charges in the District Court of Douglas County, Nebraska, on multiple counts of forcible first degree sexual assault (common law rape). Hunt also faces charges on several accompanying counts of nonsexual felonies, and one charge of nonforcible sexual assault (statutory rape). Pending trial on these charges, Hunt currently is incarcerated at the Douglas County Corrections Center in Omaha, Nebraska.

The state court files [Exhibits No. 1, No. 2, and No. 3] reflect that when Hunt initially appeared on the charges described above in Omaha Municipal Court, he was admitted to bail on all of the non-sexual criminal charges against him, and was denied bail only on the remaining sexual offense charges.

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1 Article I, section 9 of the Constitution of the State of Nebraska was amended by a vote of the people on November 7, 1978. Article I, section 9 of the Nebraska Constitution now provides:

> All persons shall be bailable by sufficient sureties, except for treason, *sexual offenses involving penetration by force or against the will of the victim,* and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Neb. Const. art. I, § 9 (emphasis added). The 1978 amendment added the phrase "sexual offenses involving penetration by force or against the will of the victim" to an article which otherwise has existed since the Nebraska Constitution was first adopted. *Parker v. Roth,* 202 Neb. 850, 852, 278 N. W. 2d 106, 109 (1979).

After being bound over to Douglas County District Court, Hunt entered pleas of not guilty to all of the charges against him. Hunt appeared with counsel before defendant District Judge James M. Murphy on May 23, 1980, for a review of the previous denials of bail. On behalf of Hunt, counsel stated his opinion that the Municipal Court had denied bail only on the sexual offense charges because of the 1978 bail amendment.

Counsel further pointed out at the district court bail review hearing that Hunt had resided in Omaha, Nebraska, for about ten years, that he had no significant criminal record, that he otherwise presented no nonappearance risk, and that apart from application of the 1978 bail amendment he was fully qualified to have bail set under applicable Nebraska statutes. For purposes of bail consideration only, the parties stipulated that the proof was evident and the presumption great.[2]

At the conclusion of the bail review hearing, the state district court denied Hunt's renewed request that bail be set for him on any of the sex crime charges pending against him. The state district court relied upon the Nebraska Supreme Court's recent decision in *Parker v. Roth*, 202 Neb. 850, 278 N. W. 2d 106 (1979), *cert. denied*, — U. S. —, 100 S. Ct. 240, 62 L. Ed. 2d 177 (1979)[3]

In addition to successfully stipulating as to the operative facts of these cases, the attorneys involved here

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2 The phrase regarding the proof being evident and the presumption being great is derived from the last clause of the first sentence of *Neb. Const.* art. I, § 9.

3 Justices Marshall, Brennan, and Blackmun dissented, i. e., they would have granted certiorari. No dissenting opinion was filed, though.

should be commended for skillfully narrowing and briefing the important legal issues. The pertinent questions of law can be summarized as follows:

1. Does the Eighth Amendment's prohibition against "excessive bail" apply to the States by virtue of the Fourteenth Amendment?

2. Does the Eighth Amendment create a right to bail, or does it only provide that bail shall not be excessive in those cases where it is otherwise proper to grant bail?

3. Is there a constitutionally "fundamental right" to bail?

4. Does the 1978 bail amendment violate the Equal Protection Clause of the Fourteenth Amendment?

5. Does the 1978 bail amendment violate the presumption of innocence guaranteed by the Due Process Clause of the Fourteenth Amendment?

6. Does the 1978 bail amendment violate either the right to effective assistance of counsel or the right of freedom to prepare one's defense, as guaranteed by the Sixth and Fourteenth Amendments?, and

7. Does the 1978 bail amendment violate the Cruel and Unusual Punishment Clause of the Eighth Amendment?

Perhaps the reason why the attorneys have succeeded in narrowing the legal issues of these two cases is that the same issues were litigated by almost the same attorneys in *Parker v. Roth*, 202 Neb. 850, 278 N. W. 2d 106 (1979).

In *Parker*, Chief Justice Norman Krivosha wrote the majority opinion for the nearly unanimous Nebraska Supreme Court.[4] Chief Justice Krivosha's written opinion provides a lengthy, detailed analysis and discussion of each of the seven issues summarized above. With the exception of the first issue, in regard to which it conceded that the Eighth Amendment probably is binding on the States through the Fourteenth Amendment, the Nebraska Supreme Court rejected all of the other constitutional arguments now made by Hunt.

This Court is cognizant that its function is not to review the decisions of the Nebraska Supreme Court. However, after considering the explanations set out in the *Parker* case, as well as making an independent analysis of the applicable law, the Court is convinced that Chief Justice Krivosha's opinion in *Parker* correctly disposes of Hunt's constitutional objections to the 1978 bail amendment. Therefore, the Court hereby adopts the ruling of the Nebraska Supreme Court in *Parker*. Since the Court agrees with both the holding and rationale of *Parker*, it would not really add anything to simply reiterate here that extensive constitutional analysis.

In light of the foregoing, in Civil No. 80-0-361, the Court must deny Hunt's petition for a writ of habeas corpus. Similarly, in Civil No. 80-0-377, the Court must with-

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4 Judges Boslaugh, Clinton, Brodkey, White and Hastings joined in Chief Justice Krivosha's opinion. Judge McCown concurred in the result, but argued that the right to bail is a "fundamental right" and that any constitutional enactment dealing with it must be strictly construed. *Parker v. Roth, supra*, 202 Neb. at 871-72, 278 N. W. 2d at 118 (McCown, J., concurring).

hold the declaratory and injunctive relief that Hunt asks for in his civil rights complaint.

An order shall issue contemporaneously with this memorandum opinion.

Dated this 17th day of October, 1980.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

80-2067

EUGENE HUNT,

Appellant,

vs.

RICHARD ROTH, Sheriff of Douglas County, Nebraska; and JOSEPH VITEK, Warden, Douglas County Corrections Center, and Director of Douglas County Department of Corrections,

Appellees,

vs.

STATE OF NEBRASKA,

Appellee.

80-2068

EUGENE L. HUNT,

Appellant,

vs.

JAMES M. MURPHY, District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska,

Appellee.

(Filed May 26, 1981)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Richard Roth, Joseph Vitek, James M. Murphy, and the State of Nebraska, appellees herein, hereby appeal to the Supreme Court of the United States from the final order of this Court declaring certain portions of the Constitution of the State of Nebraska to be violative of the Constitution of the United States entered on May 13, 1981.

This appeal is taken pursuant to 28 U. S. C. § 1254 (2).

STATE OF NEBRASKA, et al.,
Appellees,

BY PAUL L. DOUGLAS
Attorney General

BY /s/ Terry R. Schaaf
Assistant Attorney General

2115 State Capitol
Lincoln, Nebraska 68509
Telephone (402) 471-2682

Attorneys for Appellees.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Notice of Appeal to the United States Supreme Court upon the appellant herein by mailing said copy in the United States Mail, first class postage prepaid, addressed to the appellant's attorney of record, Bennett G. Hornstein, Assistant Public Defender, 306 Hall of Justice, Douglas County Courthouse, Omaha, Nebraska 68183, on this 22 day of May, 1981.

/s/ Terry R. Schaaf
Assistant Attorney General

One of Appellees' Attorneys.

OFFICE OF THE
FILED
NOV 2 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2165

In The

Supreme Court of the United States

October Term, 1980

JAMES M. MURPHY,
District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska,

Appellant,

vs.

EUGENE L. HUNT,

Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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APPEAL DOCKETED JUNE 22, 1981
PROBABLE JURISDICTION NOTED
OCTOBER 5, 1981

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No. 80-2165

In The

Supreme Court of the United States

October Term, 1980

JAMES M. MURPHY,
District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska,

Appellant,

vs.

EUGENE L. HUNT,

Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

CHRONOLOGICAL LIST OF IMPORTANT DATES

June 9, 1980 —Plaintiff's complaint filed in United States District Court for the District of Nebraska

July 22, 1980 —Defendant's Answer filed

August 1, 1980 —Order entered by United States District Court approving parties' stipulation to have case submitted and decided on specified exhibits and briefs

October 17, 1980 —Memorandum and Order entered by United States District Court denying plaintiff relief and dismissing his complaint

October 24, 1980 —Plaintiff's appeal to United States Court of Appeals for the Eighth Circuit filed

February 10, 1981—Plaintiff's appeal orally argued and submitted to United States Court of Appeals

May 13, 1981 —Opinion filed by United States Court of Appeals holding challenged 1978 bail amendment to Nebraska Constitution to violate Eighth and Fourteenth Amendments of the United States Constitution, reversing the District Court's dismissal of plaintiff's complaint, and remanding case for issuance of a declaratory judgment in accord with its opinion

June 22, 1981 —Defendant's notice of appeal and Jurisdictional Statement filed in Supreme Court of the United States

July 20, 1981 —Plaintiff's Motion to Affirm or Dismiss filed in Supreme Court

October 5, 1981 —Supreme Court notes probable jurisdiction

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Civil No. 80-0-377

EUGENE L. HUNT, Plaintiff

vs.

JAMES M. MURPHY, District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska, Defendant

EXHIBIT 9

NEBRASKA LEGISLATIVE BILL 553 (1978) PROPOSING CONSTITUTIONAL AMENDMENT TO RENDER CERTAIN SEXUAL OFFENSES NONBAILABLE

Approved by Governor April 24, 1978

(Case Numbers Omitted in Printing)

LAWS

Passed by the
LEGISLATURE OF THE STATE OF NEBRASKA
EIGHTY-FIFTH LEGISLATURE
SECOND SESSION
1978

(Irrelevant Introductory Material Omitted in Printing)

(Nebraska Secretary of State's Authentication Omitted in Printing)

LEGISLATIVE BILL 553

Approved by the Governor April 24, 1978
Introduced by Duis, 39

AN ACT for submission to the electors of an amendment to Article I, section 9, of the Constitution of Nebraska, relating to the Bill of Rights; to provide that sexual offenses shall be nonbailable; to provide for the time and manner of submission and form of ballot; and to provide the effective date thereof.

Be it enacted by the people of the State of Nebraska,

Section 1. That at the general election in November, 1978, there shall be submitted to the electors of the State of Nebraska for approval the following amendment to Article I, section 9, of the Constitution of Nebraska, which is hereby proposed by the Legislature:

"Sec. 9. All persons shall be bailable by sufficient sureties, except for treason, *sexual offenses involving penetration by force or against the will of the victim,* and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Sec. 2. The proposed amendment shall be submitted to the electors in the manner prescribed by Article XVI, section 1, of the Constitution of Nebraska. The proposition for the submission of the proposed amendment shall be placed upon the ballot in the following form:

"Constitutional amendment to provide, that certain sexual offenses shall be nonbailable.

For

Against"

Sec. 3. That the proposed amendment, if adopted, shall be in force and take effect immediately upon the completion of the canvass of the votes, at which time it shall be the duty of the Governor to proclaim it as a part of the Constitution of Nebraska.

(-1-) (329)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EXHIBIT 7

NEBRASKA GOVERNOR'S PROCLAMATION
OF ENACTMENT OF 1978
NO-BAIL CONSTITUTIONAL AMENDMENT

Signed December 5, 1978

EXHIBIT 7

(Case Numbers and Nebraska Secretary of State's Certificate and Seal Omitted in Printing)

STATE OF NEBRASKA
Executive Office

LINCOLN

PROCLAMATION

(Filed December 5, 1978)

WHEREAS, there has been submitted to the voters of the State of Nebraska, for their approval or rejection, at the regular General Election held on the seventh day of November 1978, proposed by Legislative Bill 553 of the Eighty-Fifth Legislature—Second Session, the following proposition:

"The following amendment to Article I, Section 9, of the Constitution of Nebraska—'Sec. 9. All persons shall be bailable by sufficient sureties, except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.'"

AND WHEREAS, it appears by the canvass of the State Board of Canvassers that, at said General Election, 355,949 votes were cast in favor of said measure and 79,179 votes were cast against it; that a majority of the electors voting on said measure adopted it; and that the votes case in favor of the measure were not less than thirty-five percent of the total votes cast in said election:

THEREFORE, I, J. James Exon, Governor of the State of Nebraska, by virtue of the power vested in me by the Constitution and Laws of the State, DO HEREBY PROCLAIM AND DECLARE the said measure to have been approved by the constitutional majority of the people voting on this measure and the said amendment now to be in full force and effect as a part of the Constitution of the State of Nebraska.

IN WITNESS WHEREOF, I hereunto subscribe my name and cause to be affixed the Great Seal of the State of Nebraska this 5th day of December, One Thousand Nine Hundred and Seventy-Eight.

(Seal Omitted in Printing)

/s/ J. J. Exon
Governor

/s/ Allen J. Beermann
Secretary of State

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EXHIBIT 11

SURVEY OF DISPOSITION OF NO-BAIL SEXUAL OFFENSE PROSECUTIONS DURING ONE YEAR AFTER APPROVAL OF NO-BAIL AMENDMENT

Dated November 8, 1979

EXHIBIT 11

(Case Numbers Omitted in Printing)

(Compiled by the Douglas County Public Defender for use as an exhibit attached to its Petition for Rehearing of the order denying its Petition for Writ of Certiorari in *Parker v. Roth*, No. 79-5004, United States Supreme Court)

DISPOSITION OF KNOWN NO BAIL FIRST-DEGREE SEXUAL ASSAULT CASES UNDER "RAPE-BAIL" AMENDMENT TO ARTICLE I, SEC. 9, NEBRASKA CONSTITUTION AS OF NOVEMBER 8, 1979

•indicates charge of *nonforcible* sexual assault

Name	Court in which Prosecuted	Case No.	Date of Arrest or Charge	Nature of Disposition	No. of Days Held w/o Bail
Donald Dillon	Dawson County District Court	?	1-12-79	acquitted by jury 3-16-79	64
•Gaines Havens	Phelps County District Court	6878	5-25-79	acquitted by jury 7-19-79	56
Herbert Hopkins	Adams County District Court	20207	8-1-79	jury trial now in progress	100

Name	Court in which Prosecuted	Case No.	Date of Arrest or Charge	Nature of Disposition	No. of Days Held w/o Bail
Gary Tatum	Buffalo County District Court	5934	9-12-79	jury trial now in progress	57
Thomas Friel	Lancaster County District Court	53-14	2-6-79	amended to third-degree sexual assault (bailable misdemeanor)	145
Victor Avila	Lancaster County District Court	53-133	4-23-79	amended to third-degree sexual assault (bailable misdemeanor) and bail set 7-25-79	94
Faustos Gonzales	Lancaster County Court	174-44	5-7-79	amended to disturbing the peace (bailable misdemeanor) and bail set 6-8-79	30
Paul Hollenbeck	Lancaster County Court	164-67	5-9-79	dismissed 6-25-79	2
Harry Britain	Lancaster County District Court	53-209	6-4-79	amended to third-degree sexual assault (bailable misdemeanor)	73
Alan Adkins	Lancaster County District Court	54-22	6-25-79	amended to attempted sexual assault (bailable felony)	112
Vincent Harroun	Lancaster County District Court	53-257	6-26-79	amended to burglary (bailable felony) and bail set 10-22-79	116

Name	Court in which Prosecuted	Case No.	Date of Arrest or Charge	Nature of Disposition	No. of Days Held w/o Bail
Ezra Wright*	Douglas County District Court	105-91 & 109	4-23-79	charged with and found guilty after a bench trial of nonforcible sexual assaults on two minors on 8-8-79	107
Kenneth Hitt*	Douglas County District Court	105-110	4-30-79	charged with and found guilty by a jury on 9-12-79 of nonforcible sexual assaults on two minors	136
Edward Boyd	Douglas County District Court	106-46	9-4-79	pending	65
James Joyce	Douglas County District Court	106-89	9-19-79	pending	50
Anthony Williams*	Douglas County District Court	106-107	9-21-79	pending charges of non-forcible sexual assaults on two minors	48
Alonzo Sturgeon	Douglas County District Court	106-114, 115, 134	6-8-79 9-26-79	pending	153
Magellan Hudson	Douglas County District Court	106-125	9-27-79	pending	43
Floyd Maeberry	Douglas County District Court	106-126	9-27-79	pending	43

Name	Court in which Prosecuted	Case No.	Date of Arrest or Charge	Nature of Disposition	No. of Days Held w/o Bail
Charles Anderson*	Douglas County District Court	106-185	10-16-79	pending charge of non-forcible sexual assault on a minor	24
Minh Nguyen*	Douglas County District Court	106-189	10-17-79	pending charge of non-forcible sexual assault on a minor; bail initially refused and later set on 11-1-79	15
Michael Charlie	Lancaster County District Court	53-260	6-26-79	amended to terroristic threat (bailable felony)	30
Carl Kelly	Lancaster County Court	174-751	7-10-79	dismissed 7-18-79	9
Steve Wilson	Lancaster County District Court	53-278	7-14-79	amended to nonsexual misdemeanor assault (bailable) 7-23-79	10
Thomas Welchel	Lancaster County District Court	54-56	8-6-79	pending	94
Michael Fields	Lancaster County Court	174-1086	8-10-79	amended to nonsexual misdemeanor assault (bailable)	11
Joseph George	Lancaster County District Court	54-83	8-14-79	pending	86

Name	Court in which Prosecuted	Case No.	Date of Arrest or Charge	Nature of Disposition	No. o Days Held w/o Ba
Virgil Riley	Lancaster County Court	175-267	9-26-79	amended to contributing to the delinquency of a minor (bailable misdemeanor)	1
Vincente Garza	Douglas County District Court	104-264	1-12-79	dismissed 3-20-79	67
Terry Parker	Douglas County District Court	104-267	1-12-79	amended to third-degree sexual assault (bailable misdemeanor) and bail set on 3-27-79	74
Joyce Tipton	Douglas County District Court	105-32, 33, 34 & 35	4-2-79	found guilty as charged after bench trial and committed as Mentally Disordered Sex Offender on 7-13-79	102
Alon Washington*	Douglas County District Court	105-84	4-18-79	charged with and found guilty by a jury on 6-12-79 of nonforcible sexual assault on an incompetent	55

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EXHIBIT 5

TRANSCRIPT OF PLAINTIFF'S BAIL REVIEW HEARING BEFORE DEFENDANT NEBRASKA STATE DISTRICT JUDGE

Held May 23, 1980

(Case Numbers Omitted in Printing)

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

Doc. 107 Nos. 409, 410, 411

BILL OF EXCEPTIONS

Volume I — Index, Proceedings
(Pages A, 1-5)

THE STATE OF NEBRASKA,

Plaintiff,

vs.

EUGENE L. HUNT, a/k/a
EARL CAMPBELL,

Defendant.

Proceedings heard before The Honorable James M. Murphy, Judge, on 23 May, 1980; taken before Gary Don Luckert, Official Court Reporter, in District Courtroom No. 2, Douglas County Hall of Justice, Omaha, Nebraska 68183.

(Court Reporter's Notary Seal and Clerk's Filing Samp Omitted in Printing)

(Court Reporter's Certificate Omitted in Printing)

(Page 2)

(At 1:15 P.M. on 23 May, 1980, in the District Court of Douglas County, in Omaha, Nebraska, before The Honorable James M. Murphy, one of the judges of said court, with Mr. Thomas P. McKenney appearing as counsel for the plaintiff and Mr. Bennett G. Hornstein and Mr. Ivory Griggs appearing as counsel for the defendant, and the defendant present, the following proceedings were had:)

The Court: Are you ready to proceed?

Mr. Hornstein: Okay, Your Honor, we're here today in these three cases of Mr. Hunt, consecutive docket numbers. The purpose of this appearance is to have a bail review by the Court pursuant to Sec. 29-901.03, which provides that any time—24 hours after bail has been imposed or some sort of bail has been set or refused and the defendant's unable to make bail, he can appeal to a District Judge to have the lack of release reviewed. My understanding of the usual procedure is that there's no written motion filed.

The Court: No, it's customary that we review the bonds on the request of counsel orally.

Mr. Hornstein: Okay. So we're just making an oral request. We haven't filed any written motion because I understand that's not required by the usual custom here.

Now, the—My Understanding—although the Municipal Court transcript, I don't think, is in the file yet—is that Mr. Hunt appeared in Municipal Court sometime within the last couple of weeks, and he's got several charges against him. There are four (Page 3) first-

degree-sexual-assault charges and several other felony charges, nonsexual felony charges.

And at that time Judge Wolf of the Municipal Court set bail on all the charges except for the first-degree-sexual-assault charges. And it's our belief that the reason he didn't set bail on the four sexual-assault charges was because of the constitutional amendment that was passed in late 1978, which amended Article I, Sec. 9, of the Nebraska Constitution to provide that, in certain sexual-offense cases, bail could be refused.

And the purpose of this review today is to have the Court review that denial of bail just on those four charges. We're not interested in having bail reviewed on the other charges.

And, just as a bit of background, our office file, based on the interview with Mr. Hunt, reflects that he's lived in Omaha continuously since 1960. He denies any prior significant criminal record, certainly any felonies. Now, according to our record, we have no—There may have been some arrests, but he denies any convictions.

And, according to the Nebraska bail statutes, the purpose—or exclusive purpose of bail, according to the statutes, is to reasonably assure the appearance of the defendant as required. And our feeling is that—that the denial of bail on this case is unjustified, although I realize that the constitutional amendment overrides this—these statutes.

And, for purposes of bail only—My understanding is that (Page 4) Mr. Hunt has already pled not guilty at a prior arraignment. For purposes of this hearing

only, we would stipulate that the proof is evident and the presumption is great for your consideration under the—under the Article I, Sec. 9, bail amendment.

The Court: Is it stipulated by the State that the proof would be great. . . .

Mr. McKenney: Yes, it is, Your Honor.

Mr. Hornstein: Yeah, just of these four sexual-assault charges that we're considering. My understanding is he waived the preliminary hearing on those charges.

The Court: May I have the decision on Parker? Mr. Hunt in a case which came up before this Court in 1979 and which was appealed to the State Supreme Court of Nebraska, the constitutionality of this section of the State Constitution was challenged; and the Supreme Court of the State of Nebraska held that the provision which permits a judge not to allow bail in a first-degree-sexual-assault case, forcible-sexual-assault case, where the evidence is strong and the proof is—How does that . . .

Mr. Hornstein: I think it's where the proof is evident and the presumption is great, which is what we're stipulating to.

The Court: Where the proof is evident and the presumption is great, that a court need not set bail. And, for that reason, your request is denied. And it's the order of the Court that you be held on Doc. 107-409 on one count of first-degree sexual assault on a child without bail; in Doc. 107-410, on one count of (Page 5) first-degree, forcible sexual assault, that you be held without bail; and in Doc. 107-411, on two counts of first-degree,

forcible sexual assault, that you're to be held without bail. The previsions on the other counts set for bail will be the same as they were set in Municipal Court. Anything further?

Mr. Griggs: No, Your Honor.

Mr. Hornstein: No.

Mr. Griggs: Thank you very much, Your Honor.

The Court: The docket entry will so reflect *Parker v. Roth.*

Mr. Hornstein: Okay, Judge.

(This record ended at 1:27 P.M.)

END OF PROCEEDINGS.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PLAINTIFF'S FEDERAL COMPLAINT
Filed June 9, 1980

(Caption Omitted in Printing)

The Complaint of Eugene L. Hunt respectfully shows that:

1. Plaintiff and Defendant are citizens of the United States of America and the State of Nebraska.

2. This action arises and this Court has jurisdiction of this action under Title 42 United States Code, Sections 1983 and 1988, and Title 28 United States Code, Section 1343.

3. At all times pertinent to this Complaint, the Defendant was a Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska, and in doing the acts and things hereinafter set forth, said Defendant was acting in said capacity, under color of a 1978 Amendment to the Bail Clause of Article I, Section 9 of the Constitution of Nebraska providing that

> "All persons shall be bailable by sufficient sureties, except for treason, *sexual offenses involving penetration by force or against the will of the victim,* and murder, where the proof is evident or the presumption great". (Emphasis added on new language of 1978 Constitutional Amendment).

4. Plaintiff is presently in custody and imprisoned in the Douglas County, Nebraska Corrections Center pursuant to an order and judgment of the Defendant District Judge entered on May 23, 1980, denying Plaintiff's motion that bail be fixed on certain charges of first degree sexual assault pending against him in Douglas County, Nebraska.

5. Plaintiff has been subjected because of the above-recited denial of his motion for bail by the Defendant in reliance upon the aforementioned 1978 Amendment to the Bail Clause of the Nebraska Constitution, to the deprivation by the Defendant, under color of law, and of the customs and usages of the State of Nebraska, of rights, privileges, and immunities secured to Plaintiff by the Constitution and Laws of the United States, and particularly his Federal Constitutional rights to be free from excessive bail and cruel and unusual punishment, to due process and equal protection of the laws, and to the effective assistance of counsel under the Sixth, Eighth, and

Fourteenth Amendments to the United States Constitution.

WHEREFORE, Plaintiff prays for:

1. A judgment declaring that the aforementioned 1978 Amendment to the Bail Clause of Article I, Section 9 of the Constitution of Nebraska rendering certain sexual offenses, such as those with which the Plaintiff is presently charged, nonbailable is unconstitutional under the aforementioned provisions of the United States Constitution.

2. A judgment permanently enjoining the further application or enforcement of the aforementioned 1978 Amendment to the Bail Clause of the Nebraska Constitution.

3. A judgment for Plaintiff's court costs, attorney fees and litigation costs under Title 42 United States Code, Section 1988, and other necessary and just relief.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA DEFENDANT'S ANSWER

Filed July 22, 1980

(Caption Omitted in Printing)

COMES NOW the defendant by and through his attorneys and for his answer to the complaint in the above captioned action, admits, denies, and alleges as follows:

1. Admits the allegations in paragraphs numbered 1, 2, 3, and 4 of the plaintiff's petition.

2. Denies the allegations in paragraph number 5 of the plaintiff's petition.

3. Alleges that there has been no deprivation of the plaintiff's rights secured him by the United States Constitution as a result of his being denied bail under Article I, section 9 of the Constitution of the State of Nebraska.

WHEREFORE, the defendant moves this court to dismiss this complaint for the reason that there has been no deprivation of the plaintiff's rights secured him by the United States Constitution and for such other relief as this court may deem appropriate and proper.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ORDER APPROVING PARTIES STIPULATION TO HAVE CASE SUBMITTED AND DECIDED ON SPECIFIED EXHIBITS AND BRIEFS

Entered August 1, 1980

(Captions Omitted in Printing)

This matter comes before the Court upon the Stipulation of all of the parties hereto, and the Court, being fully advised in the premises finds that said Stipulation is acceptable to the Court and should be effected by this Order.

IT IS, THEREFORE, ORDERED that:

1. These two cases are hereby consolidated for briefing, oral argument if any, consideration, and decision by the Court.

2. Petitioner-Plaintiff shall be allowed until August 8, 1980 to file his brief addressing the merits of these two cases; Respondents, Defendant, and the intervenor shall

be allowed ten days from the receipt of the foregoing brief to file their briefs responding thereto, and the Petitioner-Plaintiff shall be permitted five days thereafter to reply.

3. The numbered exhibits, a list of which is attached hereto, including the state trial court records and other documents, are hereby deemed admitted into evidence by the Court for its consideration in lieu of any evidentiary hearing which might be ordered in the above-captioned habeas corpus case or trial in the above-captioned civil rights case.

4. Upon receipt by the Court of the aforementioned briefs of the parties and the stipulated evidentiary exhibits, both of these cases shall be deemed fully submitted for consideration and decision by the Court, subject to the Court's right to request oral argument of counsel which shall be deemed waived by all the parties if such oral argument will result in a substantial delay in the Court's consideration and decision of these cases.

DATED this 1st day of August, 1980.

BY THE COURT:

/s/ Robert V. Denney
United States District Judge

(Attached List of Stipulated Exhibits Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ORDER DENYING PLAINTIFF RELIEF
AND DISMISSING COMPLAINT

Entered October 17, 1980

(Caption Omitted in Printing)

In accordance with the Memorandum opinion issued contemporaneously herewith,

IT IS HEREBY ORDERED that the declaratory and injunctive relief sought by plaintiff in his complaint is denied, and the complaint is thus dismissed.

Dated this 17th day of October, 1980.

BY THE COURT

/s/ Robert V. Denney
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

MEMORANDUM OPINION OF UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
NEBRASKA DENYING PLAINTIFF RELIEF
AND DISMISSING COMPLAINT

Filed October 17, 1980

The Memorandum Opinion of the United States District Court appears beginning at Page App. 39 in Appendix B of the Appellant's Jurisdictional Statement.

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT REVERSING THE JUDGMENT OF THE DISTRICT COURT

Filed May 13, 1981

The opinion of the United States Court of Appeals for the Eighth Circuit appears beginning at Page App. 1 in Appendix A of the Appellant's Jurisdictional Statement.

Office-Supreme Court, U.S.
FILED
JUL 20 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2165

In The

Supreme Court of the United States

October Term, 1980

JAMES M. MURPHY,

District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska,

Appellant,

vs.

EUGENE L. HUNT,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO AFFIRM OR DISMISS

BENNETT G. HORNSTEIN
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Attorney for Appellee

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTIONS PRESENTED

1. Whether the Excessive Bail Clause of the Eighth Amendment to the Constitution of the United States is applicable to the states through the Due Process Clause of the Fourteenth Amendment.

2. Whether the Excessive Bail Clause of the Eighth Amendment creates a constitutional right to bail, and if so, to what extent.

3. Whether the 1978 amendment to the Bail Clause (Article I, Section 9) of the Constitution of Nebraska which denies bail to persons, including appellee, charged with "sexual offenses involving penetration by force or against the will of the victim" violates the Excessive Bail Clause of the Eighth Amendment to the Constitution of the United States.

4. Whether the 1978 amendment to the Bail Clause of the Constitution of Nebraska violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

5. Whether the 1978 amendment to the Bail Clause of the Constitution of Nebraska violates the presumption of innocence protected by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

6. Whether the 1978 amendment to the Bail Clause of the Constitution of Nebraska violates the rights to the effective assistance of counsel and freedom to prepare a defense protected by the Sixth Amendment to the Constitution of the United States.

7. Whether the 1978 amendment to the Bail Clause of the Constitution of Nebraska violates the prohibition against cruel and unusual punishment of the Eighth Amendment to the Constitution of the United States.

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No. 80-2165

In The

Supreme Court of the United States

October Term, 1980

JAMES M. MURPHY,

District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska,

Appellant,

vs.

EUGENE L. HUNT,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO AFFIRM OR DISMISS

MOTION TO AFFIRM OR DISMISS

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, appellee Eugene L. Hunt moves that the judgment below of the United States Court of Appeals for the Eighth Circuit be affirmed, or this appeal be dismissed, because the issues raised herein are too unsubstantial to warrant plenary review, there is no apparent

conflict between the decision below and decisions of the other Federal Circuit Courts of Appeals, and the decision below is correct and consistent with decisions of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV, United States Constitution

. . . ; nor shall any States deprive any person of liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment VIII, United States Constitution

Excessive bail shall not be required . . . , nor cruel and unusual punishments inflicted.

Amendment VI, United States Constitution

In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Appellee generally accepts the Statement of the Case contained in appellant's Jurisdictional Statement, but would add that because the decision below of the Court of Appeals dismissed appellee's habeas corpus appeal as moot, and appellee has not nor does he intend to petition for certiorari from that ruling, the only case which is now

properly before this Court is the appeal by appellant Murphy in appellee's No. 1983 civil rights case. For this reason, the inclusion of the habeas corpus case in the caption of appellant's Jurisdictional Statement is incorrect, and appellee has therefore modified the caption on this Motion to Affirm or Dismiss to correct this error and otherwise conform the caption to the facts of this case and applicable Supreme Court Rules.

ARGUMENT

A. The issues raised by this case are too unsubstantial to warrant plenary review because the Nebraska Law declared unconstitutional by the Court of Appeals is nearly unique and a decision by this Court will therefore have minimal national impact.

While appellee concedes that the constitutional issues raised by this appeal are certainly novel, interesting, and important to the extent that they have never been clearly resolved by this Court and concern the liberty of a number of actual and potential criminal defendants in Nebraska, the fact remains that the Nebraska law struck down by the Court of Appeals has not to the knowledge of counsel been adopted by any other jurisdiction in the United States. For this reason, the impact of this Court's decision in this appeal will be limited to the State of Nebraska and those relatively few Nebraska defendants charged with the sexual offenses affected by the invalidated state constitutional amendment.

Although a few other jurisdictions have adopted constitutional provisions or statutes restricting bail for certain classes of multiple offenders or dangerous defendants, none of these except perhaps a recent Michigan constitutional amendment bear any similarity to the Nebraska law which is the subject of this appeal. See D. C. Code Ann. Sec. 23-1322; Ariz. Const. Art. II, Sec. 22; Tex. Const. Art. V, Sec. 11 (a); Utah Const. Art. I, Sec. 8; and Mich. Const. Art. I, Sec. 15. Most other American jurisdictions follow the traditional pattern originating with the 1787 Ordinance to Govern the Northwest Territory and the federal Judiciary Act of 1789 of mandating a right to bail in all but capital cases. See *Petition of Humphrey*, 601 P. 2d 103, 108-111 (Okla. Crim. 1979) (Compiling state constitutional provisions).

This Court has already denied certiorari when presented with precisely the same substantive issues raised by this appeal. *Parker v. Roth*, 202 Neb. 850, 278 N. W. 2d 106; cert. denied, Brennan, Marshall, and Blackmun JJ. dissenting, 44 U. S. 920 (1979). Such denial possibly reflects the historic reluctance of this Court to expend its limited and valuable time on problems which, though intrinsically important, are nevertheless relatively "academic or episodic". *Rice v. Sioux City Cemetery*, 349 U. S. 70, 74 (1955).

The Court has recognized that in order to be considered sufficiently important to justify granting certiorari or full briefing and oral argument on appeal, a constitutional issue must be important "to the public as distinguished from" merely the particular "parties" involved in the litigation. *Rice v. Sioux City Cemetery*, supra; *Layne & Bowler Corp. v. Western Well Works*, 261 U. S. 387, 393

(1923). For example, in *New York v. O'Neill*, 359 U. S. 1, 3 (1959) the Court granted certiorari to review a state court ruling declaring a state statute invalid under the federal Constitution "inasmuch as this holding brings into question the constitutionality of a statute now in force in forty-two States and the Commonwealth of Puerto Rico". And in *McGee v. International Life Ins. Co.*, 355 U. S. 220, 221 (1957) certiorari was granted to hear constitutional questions involving a California statute where such issues were determined by the Court to be important "not only to California but to other States which have similar laws".

Unlike the foregoing situations, most of the issues in this case affect only a narrow class of criminal defendants charged in Nebraska state courts. A survey of the number of cases affected determined that in the first year after enactment of the 1978 bail amendment, 32 defendants charged with sexual offenses in Nebraska had been denied bail. See *Hunt v. Murphy*, — F. 2d —, No. 80-2068 (8th Cir. 1981) fn. 27 contained at p. App. 33 of appellant's Jurisdictional Statement.

While it could be argued that a decision on two of the issues raised by this appeal (whether the Excessive Bail Clause of the Eighth Amendment is applicable to the states, and whether that clause creates a constitutional right to bail) would have general application throughout the United States, these issues alone are fairly abstract and a decision concerning them would be of little guidance to lawyers and judges attempting to resolve specific constitutional problems arising in the future with regard to bail.

Because the issues raised by this appeal are not sufficiently important or substantial to justify briefing and

oral argument, the judgment below of the Court of Appeals should be affirmed, or this appeal dismissed.

B. There is no apparent conflict between the decision below and decisions of other Federal Circuit Courts of Appeals.

Apart from the obvious conflict between the decision below of the Court of Appeals and the Supreme Court of Nebraska on precisely the same issues in *Parker v. Roth*, 202 Neb. 850, 278 N. W. 2d 106; cert. denied, Brennan, Marshall and Blackmun JJ. dissenting, 444 U. S. 920 (1979), there appears to be no apparent conflict between the federal Circuit Courts of Appeals on these issues. The United States Court of Appeals for the Third Circuit has just recently determined the Eighth Amendment Bail Clause to be applicable to the states through the Fourteenth Amendment. *Sistrunk v. Lyons*, — F. 2d —, 49 L. W. 2719, 29 Cr. L. Rptr. 1025 and 2129 (3rd Cir. 1981). To counsel's knowledge, all other federal Circuit Courts considering the question have done likewise. *United States ex rel. Goodman v. Kehl*, 456 F. 2d 863 at 868 (2nd Cir. 1972); *Simon v. Woodson*, 454 F. 2d 161 at 164-165 (5th Cir. 1972).

So far as concerns the other issues raised by this appeal, i. e., whether the Eighth Amendment Bail Clause creates a constitutional right to bail, and whether bail legislation similar to Nebraska's 1978 amendment violates that and other provisions of the federal Constitution, there appears to have been little, if any, litigation and therefore no apparent conflicts between the decision below and those of the other federal Circuit Courts of Appeals.

Because there is no apparent conflict between the decision below and decisions of the other federal Circuit Courts of Appeal the judgment of the Court of Appeals should be affirmed, or this appeal dismissed.

C. The decision below of the Court of Appeals is correct and consistent with decisions of this Court.

A further reason for affirming the judgment below of the Court of Appeals is that it appears correct and consistent with what little law has been decided on the subject by this Court. While the Court has never expressly held the Eighth Amendment Bail Clause applicable to the States, one of its recent opinions did state "bail . . . is basic to our system of law". *Schilb v. Kuebel,* 404 U. S. 357, 365 (1971). *Duncan v. Louisiana,* 391 U. S. 145, 149-150 (1968) indicated that the Fourteenth Amendment protects against state action rights which are "fundamental to the American scheme of justice; . . . whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty". The foregoing description of bail in *Schilb v. Kuebel,* supra, suggests that under the test of *Duncan v. Louisiana,* supra, bail is a right applicable to the states through the Fourteenth Amendment.

Although its holding was limited to finding that the challenged 1978 Nebraska bail amendment violated the Eighth Amendment Bail Clause as applicable to the States through the Fourteenth Amendment, the decision below of the Court of Appeals noted the importance of bail in protecting the presumption of innocence guaranteed by the Due Process Clause of the Fourteenth Amendment, the right to the effective assistance of counsel protected by

the Sixth Amendment, and, in fact, "the entire structure of the constitutional rights enumerated in the Bill of Rights". *Hunt v. Murphy*, — F. 2d —, No. 80-2068 (8th Cir. 1981) at p. App. 32 and p. 12 of appellant's Jurisdictional Statement.

Following is strong dictum from this Court's leading bail decision, *Stack v. Boyle*, 342 U. S. 1 (1951), supporting the Court of Appeals decision below and the contentions raised by appellee in this appeal and below that the denial of bail to him in this case violated several provisions of the federal Bill of Rights beyond the Eighth Amendment Bail Clause:

> "This traditional right to freedom before conviction (bail) permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. (citation omitted). Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning". 342 U. S. 1, 4.

For examples of other decisions of this Court, or Circuit Justices thereof, supporting the foregoing principles enunciated in *Stack v. Boyle*, supra, and followed in the decision below, see *United States v. Motlow*, 10 F. 2d 657, 659 (7th Cir. 1926); *Sellers v. United States*, 89 S. Ct. 36, 38 (1968); *Bitter v. United States*, 389 U. S. 15, 16-17 (1967); *Herzog v. United States*, 75 S. Ct. 349 (1955).

While the Court of Appeals decision below did not deal with appellee's contention that the challenged Nebraska bail amendment also breached the Equal Protection Clause of the Fourteenth Amendment, it is clear from decisions of this Court that once bail is determined to be a "fundamental" constitutional right, as suggested by the

foregoing authorities, the Nebraska law could in all likelihood not withstand the "strict scrutiny" and "compelling governmental interest" tests to be applied to it under those decisions. *Massachusetts Bd. of Retirement v. Murgia,* 427 U. S. 307 (1976); *Shapiro v. Thompson,* 394 U. S. 618 (1969).

Because the Court of Appeals decision below appears to be correct and consistent with this Court's own decisions, it should be affirmed.

CONCLUSION

For the reasons stated, appellee urges the Court to either affirm the decision below, or dismiss this appeal.

Respectfully submitted,

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No. 80-2165

In The

Supreme Court of the United States

October Term, 1980

JAMES M. MURPHY, District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska,

Appellant,

vs.

EUGENE L. HUNT,

Appellee.

On Appeal from the United States Court of Appeals for the Eighth Circuit

APPELLANT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the excessive bail clause of the Eighth Amendment to the United States Constitution is applicable to the states through the Fourteenth Amendment to the United States Constitution.

2. Whether the 1978 amendment to the bail clause of Article I, Section 9, of the Nebraska Constitution violates the excessive bail prohibition of the Eighth Amendment to the Constitution of the United States.

3. Whether the 1978 amendment to the bail clause of Article I, Section 9, of the Nebraska Constitution violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

4. Whether the 1978 amendment to the bail clause of Article I, Section 9, of the Nebraska Constitution violates any presumption of innocence protected by the due process clause of the Fourteenth Amendment or the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States or violates the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution.

5. Whether the people of the State of Nebraska through their Constitution can, without violating any of the provisions of the United States Constitution, deny bail to a class of persons where the proof of their guilt is evident or the presumption of their guilt great where this class of persons has been determined to pose a significant danger to the community.

LIST OF PARTIES

The caption of this case contains the names of all parties.

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No. 80-2165

In The

Supreme Court of the United States

October Term, 1980

JAMES M. MURPHY, District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska,

Appellant,

vs.

EUGENE L. HUNT,

Appellee.

On Appeal from the United States Court of Appeals for the Eighth Circuit

APPELLANT'S BRIEF ON THE MERITS

OPINIONS BELOW

The decision in the combined cases of *Eugene L. Hunt v. Richard Roth, etc.*, and *Eugene L. Hunt v. James M. Murphy* was filed by the United States Court of Appeals for the Eighth Circuit on May 13, 1981, and is reported at 648 F. 2d 1148 and appears as Exhibit A in the appellant's jurisdictional statement.

The decision in the combined cases of *Eugene L. Hunt v. Richard Roth, etc.*, and *Eugene L. Hunt v. James M.*

Murphy was filed by the United States District Court for the District of Nebraska on October 17, 1980. This decision is unreported and can be found as Appendix B in the appellant's jurisdictional statement.

JURISDICTION

This is an appeal from a finding by the United States Court of Appeals for the Eighth Circuit that Article I, Section 9, of the Constitution of the State of Nebraska is in part violative of the Eighth and Fourteenth Amendments to the United States Constitution. This finding was filed by the United States Court of Appeals for the Eighth Circuit on May 13, 1981. This case is a civil rights action brought pursuant to 42 U. S. C. § 1983. This Court's jurisdiction over this case is derived from 28 U. S. C. § 1254 (2). A copy of the notice of appeal filed in the United States Court of Appeals for the Eighth Circuit can be found as Appendix C in appellant's jurisdictional statement. This Court noted probable jurisdiction on October 5, 1981.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. Section 1, Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunitites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

3. Article I, Section 9, of the Constitution of the State of Nebraska:

> All persons shall be bailable by sufficient sureties, except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

4. Article I, Section 9, of the Constitution of the State of Nebraska can be found in Volume 2 of the Revised Statutes of Nebraska (Reissue 1979) on page 62.

STATEMENT OF THE CASE

In November of 1978 the people of the State of Nebraska by a direct popular vote of 356,000 in favor to 80,000 against, amended Article I, Section 9, of the Constitution of the State of Nebraska so as to provide:

> All persons shall be bailable by sufficient sureties, except for treason, *sexual offenses involving pen-*

> *etration by force or against the will of the victim,* and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Neb. Const., Art. I, § 9 (language added by amendment emphasized).

Subsequent to the passage of the constitutional amendment set out above, Eugene Hunt was charged in the District Court of Douglas County, Nebraska, with multiple counts of forcible first degree sexual assault. For purposes of bail consideration only, Mr. Hunt while represented by counsel stipulated that the proof was evident and the presumption was great and the Douglas County District Court, the Honorable James M. Murphy presiding, one of the parties herein, denied bail.

Thereafter, Mr. Hunt sought habeas corpus relief in the United States District Court for the District of Nebraska and filed a civil rights action against Judge Murphy, seeking certain declaratory relief. The United States District Court for the District of Nebraska denied all requested relief and an appeal was taken to the United States Court of Appeals for the Eighth Circuit. The United States Court of Appeals for the Eighth Circuit granted Mr. Hunt's declaratory relief sought pursuant to the Civil Rights Act and denied the habeas corpus relief sought on the basis of mootness. The United States District Court for the District of Nebraska did not require Mr. Hunt to seek relief in the Supreme Court of the State of Nebraska inasmuch as identical issues had been raised in a previous case, *Parker v. Roth,* 202 Neb. 850, 278 N. W.

2d 106 (1979), *cert. denied*, 444 U. S. 920, 62 L. Ed. 2d 177, 100 S. Ct. 1072 (1979).

Of the four charges under which Mr. Hunt was denied bail pursuant to Article I, Section 9, of the Constitution of the State of Nebraska, he was convicted of three and acquitted of one. On the charge of first degree sexual assault on a child, Mr. Hunt was sentenced to 12 to 15 years imprisonment on December 11, 1980, and thereafter filed a direct appeal to the Nebraska Supreme Court which is now pending under Case No. 43955.

On the two charges of first degree forcible sexual assault, Mr. Hunt was sentenced on November 5, 1980, to consecutive terms of 8 to 15 years imprisonment and thereafter filed a direct appeal to the Nebraska Supreme Court where it is now pending under Case No. 43885.

SUMMARY OF ARGUMENT

1. A state constitution is the fundamental and organic law of a state and reflects the direct expression of the attitude of the people of that state toward the functioning of their state political system. A federal court should accept the interpretation given a state's constitution by that state's highest court and should only declare that state's constitution in contravention of the Federal Constitution where the impediment is clear and free from all doubt.

2. While it is conceded for the sake of argument that the literal language of the Eighth Amendment is no doubt

applicable to the states through the Fourteenth Amendment, it is argued that the Eighth Amendment creates no absolute or fundamental right to bail and thus nothing more than the literal right expressed is applicable to the states through the Fourteenth Amendment.

3. The Eighth Amendment to the United States Constitution does not create a fundamental right to bail; rather, it only provides that bail shall not be excessive in those cases where it is otherwise proper to grant bail. The plain and simple language of the Eighth Amendment mandates such a conclusion as does a review of the historical background of the enactment of the amendment and an analysis of the precedent involving its interpretation.

4. The right to bail is not a fundamental right nor an absolute right and since the classification created bears a rational relationship to the object sought to be achieved and is reasonable, it is therefore not violative of the Fourteenth Amendment. The people of the State of Nebraska have directly determined that persons charged with sexual offenses involving penetration by force where the proof of their guilt is evident or the presumption of their guilt great constitute a distinct class of persons whose pretrial release could cause a severe and significant danger.

5. Article I, Section 9, does not create an irrebuttal presumption that every person charged with a sexual offense involving force poses a significant danger but merely denies them the constitutional right to demand bail, the state judge being given the discretion to determine whether the proof is evident or the presumption great or to grant

bail even if he so finds. Article I, Section 9, denies a person so accused a constitutional right to bail—it does not prohibit his release on bond.

6. States have historically, without violating the United States Constitution, denied bail where it was feared that to do so would lessen the likelihood that the accused would reappear for trial and a state may also constitutionally deny bail where it is feared that an individual's release on bail will pose a serious and substantial threat to the safety of the citizens of that state.

7. Article I, Section 9, of the Nebraska Constitution does not violate the presumption of innocence, the right to effective assistance of counsel, nor does it constitute cruel and unusual punishment.

ARGUMENT

I.

A state constitution represents the will of the people and a provision thereof should not be found to contravene the Federal Constitution unless a constitutional impediment is clearly shown to exist.

The constitution of a state is the fundamental and organic law of a state. *See, e. g., Ware v. Hylton,* 3 Dall. 199, 1 L. Ed. 568 (1796); *McCulloch v. Maryland,* 17 U. S. 316 (1819). It represents the direct and basic expression of the sovereign will of the people of a state and is the

absolute rule of action with respect to all matters it addresses. 11 Am. Jur., *Constitutional Law*, § 44, p. 651. A state constitution encompasses a general attitude on the part of the people of the state toward the functioning of their state political system. *See, Note, Theory of State Constitutions*, 1966 Utah L. Rev. 542, 547.

As the fundamental or organic law of the state, a constitution enjoys a status superior to that of a state legislative enactment. In *Board v. Attorney General*, 246 Md. 417 (1967), the court stated:

> A state constitution may aptly be likened to a legislative act enacted directly by the people themselves in their sovereign capacity as a political entity (that is, by the voters, for "the original power of the people, in their aggregate political capacity, is delegated in the form of suffrage to such persons as they deem proper"), and therefore is the fundamental, extraordinary act by which the people establish the structure and mechanism of their government. [Citations omitted.] Essentially, a constitution is fundamental legislation directly by the people acting politically in their sovereign capacity, while a law is a rule of conduct prescribed by the legislative agents of the people under and subject to the delegated limitations of the previously ordained superior legislation, the Constitution. [Citations omitted.]

Id. at 394. *See, also, Swindler, State Constitutional Law: Some Representative Decisions*, 9 W. & M. L. Rev. 166, 167-68 (1967).

Despite the status of a state constitution as the supreme law of a state, the provisions of a state constitution, as with state legislative acts, are, however, subject to the limitations found in the Federal Constitution. 16 C. J. S., *Constitutional Law*, § 70, p. 131. The Federal

Constitution is, of course, the ultimate law of the land, and the obligation to guard and enforce the rights guaranteed by that Constitution rests on the state courts equally with the federal courts. *See, e. g., Smith v. O'Grady*, 312 U. S. 329 (1941). Thus, if a state constitutional provision directly conflicts with any federal constitutional guarantees, then it is invalid and must yield to the supremacy of the Federal Constitution. *See, e. g., Louisville & N. R. Co. v. Central Stock Yards Co.*, 212 U. S. 132 (1909).

Although it is clear that state constitutional provisions cannot deny any rights guaranteed by the Federal Constitution, courts will not lightly strike down a state constitutional provision which has been challenged as violating the Federal Constitution. *See, e. g.*, 16 C. J. S., *Constitutional Law*, § 99 (b), p. 443 (1964); *North Carolina v. Butler*, 441 U. S. 369 (1979); *Reitman v. Mulkey*, 387 U. S. 369 (1967). The test employed by courts in adjudging the constitutionality of a state constitutional provision is somewhat more strict than the test used by courts in determining the constitutionality of legislative enactments. In order to justify a federal court in pronouncing a provision of the state constitution to be in contravention of the Federal Constitution, the impediment must be so clear as to be free from all doubt. See, *e. g., DeBerry v. City of LaGrange*, 62 Ga. App. 74, 8 S. E. 2d 146 (1940); *Sincock v. Duffy*, 215 F. Supp. 169 (D. Del. 1963), *aff'd*, 377 U. S. 695 (1964).

A provision of a state constitution is generally presumed not to be in conflict with the Federal Constitution unless the contrary is clearly shown. See, *e. g., American Federation of Labor v. Watson*, 60 F. Supp. 1010 (D. Fla.

1945). Every presumption of law and fact must be made in favor of the legality of the provisions of the state constitution. *See, e. g., State ex rel. Kemp v. City of Baton Rouge*, 215 La. 315, 40 So. 2d 477 (1949). The burden lies with the party who contests the validity of the constitutional provisions to prove the existence of the nullity to the exclusion of every reasonable hypothesis. *See, e. g., State ex rel. Kemp v. City of Baton Rouge, supra.*

Additionally, this Court has held is must accept whatever construction of a state constitution is placed upon it by the highest court of that state. *North Carolina v. Butler*, 441 U. S. 369 (1979), and that the holdings of the State Supreme Court on the purpose, scope, and operative effect of a provision of that state's constitution should be carefully considered by this Court in deciding the validity of state constitutional provisions under Fourteenth Amendment analysis. *Reitman v. Mulkey*, 387 U. S. 369 (1967).

Therefore, the issues raised in these cases must be reviewed in light of the above stated principles.

II.

The 1978 amendment of Article I, section 9, of the Constitution of Nebraska does not violate the excessive bail clause of the Eighth Amendment to the United States Constitution.

A. This Court has never specifically determined whether the excessive bail clause of the Eighth Amendment is applicable to the states through the Fourteenth Amendment; therefore the issue remains unsettled.

This Court has not specifically determined whether the prohibition against excessive bail established by the

Eighth Amendment to the Constitution of the United States is applicable to the states through the due process clause of the Fourteenth Amendment to the Constitution of the United States. While the issue therefore remains unsettled, this Court did state in *Gernstein v. Pugh*, 420 U. S. 103 (1975), that the Eighth Amendment's proscription of excessive bail has been assumed to have application to the states through the Fourteenth Amendment.

The United States Court of Appeals for the Third Circuit in *Sistrunk v. Lyons*, 646 F. 2d 64 (3d Cir. 1981), recently restated the test announced by this Court in *Duncan v. Louisiana*, 391 U. S. 145 (1968), to be applied when the question of the incorporation through the Fourteenth Amendment of a right contained in the first eight amendments to the United States Constitution arises.

Duncan, supra, articulated three inquiries to be used in such a determination. First, it must be determined whether the right belongs to those "fundamental principles of liberty and justice which lie at the base of our civil and political institutions." Second, whether the right is "basic to our system of jurisprudence," and third, whether the right is a "fundamental right essential to a fair trial."

While it is conceded for sake of argument that the literal language of the excessive bail clause contained within the Eighth Amendment is no doubt applicable to the states through the Fourteenth Amendment, it is argued that the Amendment neither contains nor creates an absolute or fundamental right to bail. The concept of an absolute right to bail in all cases is not a fundamental principle of liberty or justice which can be said to be found at the basis of our civil and political institutions nor is it

basic to our system of jurisprudence nor is it a fundamental right essential to a fair trial. Thus nothing more than the literal rights declared can be considered to be applicable to the states through the Fourteenth Amendment.

B. The Eighth Amendment does not create a right to bail. It only provides that bail shall not be excessive in those cases where it is otherwise proper to grant bail.

The Eighth Amendment provides in pertinent part that: "Excessive bail shall not be required." Despite the simplicity and clarity of the language employed, there exists two principal schools of thought concerning the scope of this amendment. The argument is made that the Eighth Amendment creates a right to bail. To the contrary, it is asserted that the Eighth Amendment prohibits excessive bail where a right to bail otherwise exists. The plain language of the amendment, its historical background, and the weight of judicial authority support the latter interpretation.

1. The plain and simple language of the excessive bail clause indicates that it merely prohibits excessive bail.

The only reference to bail in the Federal Constitution is that found in the above-quoted portion of the Eighth Amendment. The language of that clause simply and unambiguously precludes excessive bail. No mention is made therein of either an absolute or qualified right to bail.

Nevertheless, advocates of a constitutional right to bail argue that the right is a necessary implication of the

explicit prohibition against excessive bail. They reason that the purpose of the excessive bail prohibition is to prevent the practical denial of bail by setting the amount so unreasonably high that it cannot be met. This purpose could be thwarted, they argue, if Congress or state legislatures could define those circumstances in which an accused was not entitled to bail. *See, e. g., Carlson v. Landon*, 342 U. S. 524, 569 (1952) (Burton, J., dissenting).

While the above argument may have a degree of logical appeal, it initially raises an obvious objection. If the framers of the Constitution had intended to establish a right to bail, either absolute or conditional, they would have expressly provided for such. The total absence of any language in the Federal Constitution establishing a right to bail strongly evidences a lack of intent to create such a right.

2. The historical background of the excessive bail clause reveals that it was intended to prohibit only excessive bail.

A historical review of the legal development of bail reveals that the framers of the Constitution did not intend to establish therein a federal right to bail.

This Court in *Carlson v. Landon, supra*, noted that:

> The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept.

342 U. S. at 545.

It is deemed unnecessary here to indulge in a lengthy discourse of the development of bail in English Law. The concept of a prohibition against excessive bail gradually evolved from three principal documents; the Petition of Right of 1628; the Habeas Corpus Act of 1679; and the Bill of Rights of 1689.

The excessive bail prohibition is found in clause ten of the English Bill of Rights of 1689. Its purpose was to preclude judges from setting excessive bail in cases where an accused was by law bailable. An exhaustive analysis of the evolution and meaning of the excessive bail clause in English law is found in H. Meyer, *Constitutionality of Pretrial Detention*, 60 Georgetown Law Journal 1139, 1180-1190 (1972). *See, also,* Chief Justice Krivosha's analysis in *Parker v. Roth*, 202 Neb. 850, 278 N. W. 2d 106 (1979), *cert. denied*, 444 U. S. 920, 62 L. Ed. 2d 177, 100 S. Ct. 1072 (1979).

The nature of bail in the colonies and the events surrounding the enactment of the Bill of Rights reveals that the excessive bail clause of the Eighth Amendment was intended to correspond in scope to the identical provision in English law. In an article entitled Meyer, *Constitutionality of Pretrial Detention*, 60 Georgetown Law Journal 1139, 1191-1194 (1972), the author discusses a number of the laws involving bail which were enacted by the states prior to the enactment of the Federal Bill of Rights.

Many states, either by statutory or constitutional provisions, established both a right to bail for certain offenses and a prohibition against excessive bail. *Id.* at 1191. For example, North Carolina and Pennsylvania enacted constitutional provisions which prohibited excessive bail. *Id.*

at 1191-1192. The proposals for a federal bill of rights from each of these two states only included an excessive bail clause. *Id.* at 1193.

Another persuasive indication that the framers of the Eighth Amendment did not intend to establish a constitutional right to bail is the fact that Congress enacted a statutory right to bail in noncapital cases in the Federal Judiciary Act of 1789. *Id.* at 1194, 1455. If the Eighth Amendment was intended to grant a right to bail, its authors could not have missed the glaring inconsistency between its scope and that of the Judiciary Act of 1789. If the Eighth Amendment was intended to guarantee a right to bail, as it provides for no exceptions, the act of 1789 would have been inconsistent, since it exempted capital offenses. *Id.* at 1455.

The enactment of the Judiciary Act of 1789 in conjunction with the virtually simultaneous enactment of the Eighth Amendment indicates a conviction that an inflexible constitutional regulation of a right to bail was not desirable. Whether a particular offense should be bailable was deemed a determination more appropriately left to legislative enactment which could be more easily revised with changing circumstances and attitudes. *Id.* at 1194.

The meaning of the excessive bail clause in English law; the different treatment afforded right to bail provisions and excessive bail provisions under colonial and state law; and the federal statutory right to bail provisions contained in the Judiciary Act of 1789, all establish that the framers of the Eighth Amendment did not intend to create a federal constitutional right to bail.

A historical analysis of the excessive bail clause reveals that the framers of the Eighth Amendment intended

to do exactly what they accomplished, which is to constitutionally preclude the imposition of excessive bail in those cases where an accused has otherwise been granted a right to bail. The cases which have considered this issue are generally in accord.

3. Judicial interpretations of the excessive bail clause have held that since it only prohibits excessive bail, Congress and the states are free to define those offenses which are of a nature as to which bail may be denied, so long as the determination is reasonable.

In reviewing judicial interpretations of the Eighth Amendment, it is necessary to distinguish between cases which address the issue of whether a particular accused was required to post an excessive bail bond and cases which involve the question of whether an offense may be properly classified as nonbailable. The case at bar involves the latter issue.

The appellee's argument relies in large part on dicta from *Stack v. Boyle*, 342 U. S. 1 (1951). The petitioner therein was accused of a federal criminal offense which, under applicable statutes, was classified as bailable. Bail had been fixed in the amount of $50,000. The issue therefore was whether, based on the particular facts involved, that amount of bail was excessive under the Eighth Amendment. The court ordered the district court to reconsider a motion to reduce bail because of procedural defects. The appellee's reliance on this case is obviously misplaced.

The only decision of this Court involving the constitutionality of a statute authorizing the denial of bail is *Carlson v. Landon*, 342 U. S. 524 (1952). This case in-

volved active alien communists who were detained without bail pending deportment proceedings, pursuant to section 23 of the Internal Security Act. Said provision granted the Attorney General the discretion to detain aliens without bail. The exercise of this discretion was based on reasonable grounds to believe that the petitioners' release would be prejudicial to the public interest. This Court held that Congress constitutionally may provide for denial of bail for persons arrested pursuant to federal law. In so holding this Court stated:

> The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. Indeed the very language of the amendment fails to say all arrests must be bailable. We think clearly, here that the Eighth Amendment does not require that bail be allowed under the circumstances of these cases.

342 U. S. at 545-546.

Chief Justice Vinson, author of the opinion in *Stack, supra,* joined in the Court's opinion in *Carlson, supra.* This fact further indicates that reliance on *Stack, supra,* to support a constitutional right to bail argument is misplaced.

While it may be argued that *Carlson, supra,* is distinguishable from the case at bar since it involved the power of Congress to regulate aliens, numerous cases have considered whether state law which authorizes the denial of bail for certain offenses is unconstitutional. The courts considering the issue have uniformly upheld the power of states to deny bail for certain offenses, so long as that power is exercised reasonably.

In *Sistrunk v. Lyons*, 646 F. 2d 64 (3d Cir. 1981), the United States Court of Appeals for the Third Circuit recently observed "Of course, the Eighth Amendment does not create an absolute right to be free on bail." *Supra*, at 68. Additionally the court there observed:

> Unlike most guarantees in the Bill of Rights, it is not the naked right to bail with which we deal, rather it is the right to be free from excessive bail. While federal law is determinative on the issue of "excessiveness," federal bail statutes would appear to provide only guidance on the exact contours of the right to bail. States remain free within constitutional bounds to define the range of offenses for which bail is discretionary. Because the Eighth Amendment does not delimit the denial of bail to capital cases, Congress as well as the states could provide that other serious non-capital crimes are similarly not entitled to bail.

Sistrunk, supra, at 70. Finally the court observed:

> [T]he Constitution does not provide a right to bail per se to which the states must conform, it only sets a ceiling on its employment.

Sistrunk, supra, at 71.

In *United States v. Edwards*, D. C. Ct. App. (en banc), the District of Columbia Court of Appeals considered the constitutionality of the District of Columbia's preventive detention law. While at this writing the appellant has been unable to obtain a reported version of this case, the court is reported to have held:

> The history of the Eighth Amendment, however, is generally unilluminating and falls short of supporting, let alone compelling the conclusion that a right to bail must be found by implication. An examination of the history of the English bail indicates that the excessive bail clause was developed as a specific

> remedy for judicial abuse of the bail procedure as otherwise established by law, and did not, in and of itself, imply any right to bail.

29 Crim. Law Rptr. 2193.

The court is also reported to have held that a fundamental right to bail was not universal among the colonies or the early states given the fact that several of the original states made the right to bail a statutory rather than constitutional right and many early state constitutions specifically granted a right to bail while also providing for an excessive bail clause suggesting a recognition of the distinction between the two.

The District of Columbia Court of Appeals ultimately upheld the constitutionality of the preventive detention law, concluding that neither the history of the Eighth Amendment's excessive bail clause nor the historical evidence nor contemporary fundamental values implicit in the criminal justice system require recognition of the right to bail as a basic human right.

In spite of its holding below, the United States Court of Appeals for the Eighth Circuit in *Mastrian v. Hedman*, 326 F. 2d 708 (8th Cir. 1964), *cert. denied*, 376 U. S. 965 (1964) previously held:

> Neither the Eighth Amendment nor the Fourteenth Amendment requires that everyone charged with a state offense must be given his liberty on bail pending trial. . . . Traditionally and acceptedly, there are offenses of a nature as to which a state properly may refuse to make provision for a right to bail.

Id. at 710.

In *Turco v. State of Maryland*, 324 F. Supp. 61 (D. Md. 1971), *aff'd*, 444 F. 2d 56 (4th Cir. 1971), the peti-

tioner was denied bail under a court rule which authorized the court to exercise discretion in allowing bail in capital cases. The petitioner alleged a violation of the Eighth Amendment. In rejecting his contention, the court stated:

> It should be noted that the Eighth Amendment has never been considered to prevent Congress from classifying criminal cases into those in which an accused is entitled to bail as a matter of right and those in which the allowance of bail is a discretionary matter. [Citations omitted.]
>
> If the federal government is not proscribed by the Eighth Amendment from denying bail in certain types of cases, neither is the State of Maryland prohibited from following a rule classifying types of criminal cases into those in which bail is allowed as a matter of discretion. *Mastrian v. Hedman, supra; Dameron v. Harson*, 255 F. Supp. 533 (W. D. La. 1966), *aff'd*, 364 F. 2d 991 (5th Cir. 1966).

Id. at 63-64.

In *United States ex rel. Covington v. Coparo*, 297 F. Supp. 203 (S. D. N. Y. 1969), the petitioner, who was charged with first degree murder, was denied bail under a New York statute which leaves admission to bail in felony cases to the discretion of the court. First degree murder was not a capital offense in New York. The petitioner alleged that his denial of bail in a noncapital offense constituted a violation of the Eighth Amendment. The court rejected his contention and stated:

> Petitioner assumes that the Eighth Amendment, binding upon the State of New York under the Fourteenth Amendment, requires that bail be granted as a matter of right in all except capital crimes. The Eighth Amendment, however, does not mention, much less distinguish between, capital and other felonies.

> It provides only that "excessive bail shall not be required. . . ." It is true, as petitioner contends, that some courts have construed the Eighth Amendment to guarantee the right to bail in all but capital cases, but such statements must be considered in the context of the Congressional statute governing bail, rather than as a command under the Eighth Amendment.

Id. at 205. The court further noted:

> And as Congress is free, within constitutional limits, to define the classes of crimes which are bailable as a matter of right and those that are not, so, too, may the state legislatures. While the Supreme Court has not passed upon the direct issue, those federal courts which have are in accord that the Eighth and Fourteenth Amendments do not require the state to grant bail in all cases as a matter of right; all have recognized that a state may constitutionally provide that bail be granted in some cases as a matter of right and denied in others, provided that the power is exercised rationally, reasonably and without discrimination. Thus, it is left to the courts to fix the amount of bail in all cases where it is a matter of right and also in those instances where the court exercises its discretion favorably but, under the Eighth Amendment where bail is fixed in either instance, it must not be excessive, and further, when bail is not a matter of right, the court may not arbitrarily or unreasonably deny bail.

Id. at 206.

The analysis of *Covington,* supra, is particularly instructive as the appellee in the case at bar appears to argue that the Eighth Amendment specifically grants a right to bail in noncapital cases. There are numerous problems with the argument that the Eighth Amendment provides for some sort of capital v. noncapital offense distinction. Obviously the language of the amendment does not so provide.

Further, when the Eighth Amendment was enacted virtually all felonies were capital offenses. *See,* J. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention,* 55 Va. L. Rev. 1223 (1967). As stated therein:

> The considerations which have led to the gradual repeal of the death penalty—primarily rehabilitative efforts in corrections, doubts concerning the deterrent effect of capital punishment and a felt disproportion between the punishment and the crime—are largely irrelevant to the question whether a defendant should be detained pending trial. Whatever the merits of these considerations with respect to the death penalty, they have little bearing on human propensities for dangerous conduct during the period between arrest and trial. As a class, persons held to answer for such dangerous offenses are robbery, rape or burglary if released pending trial pose as great a danger to the community today as they did in 1791. Accordingly, since the eighth amendment when adopted clearly permitted pretrial detention for capital crimes because of danger to the community, it should not today prohibit pretrial detention for such dangerous crimes merely because they are no longer capital for reasons completely unrelated to their dangerousness.

Id. at 1230.

The experience of Virginia is illustrative and of particular interest since many of the persons instrumental in the formulation of the Federal Constitution were from that state. Virginia has an excessive bail provision in its constitution; however, the right to bail has always been statutory. The first statutory enactment in 1785, provided a right to bail except in cases where the crime was punishable in life or limb and there was good cause to believe the accused was guilty. In 1796, Virginia revised its penal

code to reduce the number of offenses punishable by death. However, in 1801, Virginia revised its statutory right to bail provision so that bail could be denied in all cases in which it could have been denied prior to the revision of its penal code. Meyer, *Constitutionality of Pretrial Detention*, 60 Georgetown Law Journal 1139, 1193-94 (1972). There clearly is no constitutional requirement of a nexus between the capital or noncapital nature of the offense and whether or not it is bailable.

The court in *Covington, supra,* noted that the recent "enlightened" decision of New York to eliminate the death penalty in cases of first degree murder cannot automatically mean that a right to bail now exists. The penalty is only one factor to consider in determining whether bail is a matter of right. More importantly is the seriousness of the charge. The court held that the state court could reasonably have determined there was a substantial risk that the defendant, if released on bail would not appear for trial and that his release might constitute a danger to the community.

Based on the language of the excessive bail clause of the Eighth Amendment, its historial development and judicial interpretations, it is clear that there is no absolute right to bail. The states are free to define the offenses which are bailable as of right and those that are not. There is no constitutional requirement that such determination be made on the basis of whether or not the penalty is capital. The ultimate issue is whether that determination is reasonable.

III.

The 1978 bail amendment to Article I, section 9, of the Constitution of Nebraska does not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution.

The equal protection clause of the Fourteenth Amendment to the United States Constitution provides that states are forbidden to deny to any person within their jurisdiction the equal protection of the laws. The guiding principle of the constitutional guarantee of equal protection of the laws is that all persons shall be treated alike under like circumstances and conditions.

This Court has basically adopted two tests for determining whether or not a state law creating a classification violates the equal protection clause. Under the "strict scrutiny" or "compelling interest" test the classification created by state law must be necessary to promote some compelling state interest. The "minimum scrutiny" or "conceivable basis" test basically provides that a classification is valid if there is any conceivable basis upon which the classification could relate to any legitimate governmental interest. The test employed in any particular circumstance depends upon whether the classification created by the state law involves any "fundamental right"[1] or

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1 This Court has held the following to be "fundamental rights": (1) Interstate Travel, *Shapiro v. Thompson*, 394 U. S. 618 (1969); (2) Privacy, *Griswold v. Connecticut*, 381 U. S. 479 (1965); (3) Voting, *Baker v. Carr*, 369 U. S. 186 (1962); (4) Speech, *Terminiello v. Chicago*, 337 U. S. 1 (1949); (5) Religion, *Prince v. Massachusetts*, 321 U. S. 158 (1944); (6) All First Amendment Rights.

"suspect"[2] traits. If the classification affects the exercise of any "fundamental right" or is based on any "suspect" criteria, then courts will use the more stringent "strict scrutiny" test in analyzing the constitutionality of the classification. However, when the classification involves neither of the above two factors, courts will apply the less stringent "minimal scrutiny" or "conceivable basis" test.[3]

A. There is no "fundamental right" to bail.

It was argued below that the "strict scrutiny" test should be applied in analyzing whether or not Article I, Section 9, of the Constitution of Nebraska violates the equal protection clause. The essential contention is that there is a "fundamental right" to bail, thus, allowing the application of the "strict scrutiny" test. However, the appellant submits that Article I, Section 9, of the Nebraska Constitution does not affect any "fundamental right" secured by the Federal Constitution.

As discussed *supra*, there are offenses of a nature as to which Congress or a state properly may refuse to make any provision for a right to bail, provided the power to classify such offenses is exercised reasonably. *See, e. g., Mastrian v. Hedman, supra; Wansley v. Wilkerson*, 263 F. Supp. 54 (W. D. Va. 1967); and *United States ex rel. Covington v. Coparo*, 297 F. Supp. 203 (S. D. N. Y. 1969).

In addition, it has been held and as is argued herein that there exists no federal constitutional right to bail.

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2 This Court has held that classifications are "suspect" if they are based on race, national origin or alienage.

3 In cases involving gender based classification this Court has applied a "middle tier" analysis. *Orr v. Orr*, 440 U. S. 268 (1979).

See, e. g., State v. Garrett, 493 P. 2d 1232 (Ariz. 1972); *Mastrian v. Hedman, supra*; *Sistrunk v. Lyons, supra.*

The guarantee against excessive bail provided by the Eighth Amendment applies only when Congress or states have deemed that a particular offense is bailable. Therefore, since there is no "fundamental right" affected by Article I, Section 9, of the Nebraska Constitution, and the Eighth Amendment's proscription against excessive bail is not applicable to offenses which a state deems not subject to bail, then this Court should adhere to the traditional equal protection test of "minimum scrutiny."

B. The differing treatment of sexual offenders apart from other criminal offenders adopted in the 1978 bail amendment is reasonable in that it is relevant to the legitimate state purpose of protecting society.

The test under the Fourteenth Amendment is whether the classification bears some rational relationship to the legitimate purpose of the legislation. In *Dandridge v. Williams*, 397 U. S. 471 (1970), this Court stated:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classification made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."

The equal protection clause does not require that a state must choose between attacking every aspect of a problem or not attack the problem at all. A state's action must only be rationally based and free from invidious

discrimination. *Dandrige v. Williams, supra; San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973); *McGowan v. Maryland,* 366 U.S. 420 (1961).

The equal protection clause does not require that all persons be dealt with identically but it does require that the distinction made have some relevance to the purpose for which the classification is made. *Baxstrom v. Herold,* 383 U.S. 107 (1966). The question becomes whether the distinctions made are reasonable in that they are relevant to the purpose of the initial classification.

In determining whether or not a particular classification is reasonable in that it is relevant to the purpose of the classification, courts must consider the classification from the standpoint of the Legislature and the people in enacting it. This Court has held, in passing on the constitutionality of state legislation, that it is not concerned with the wisdom of or the need for such legislation. *See, Queenside Hills Realty Co. v. Saxl,* 328 U.S. 80 (1946). It is enough that it is open to the people of the state to believe the legislation and the distinctions drawn therein are valid as the basis of a policy for the people. *See, e.g., Safeway Stores, Inc. v. Oklahoma Retail Grocers Association,* 360 U.S. 334 (1959).

The 1978 bail amendment enacted by the people of the State of Nebraska applies only to those persons charged with first degree sexual assault. Neb. Rev. Stat. § 28-319 (Reissue 1979). The penal sanction ascribed to this offense is a Class II felony. Neb. Rev. Stat. § 28-105 (Reissue 1979). It provides that a person convicted of a Class II felony may be sentenced to a maximum of fifty years imprisonment with a minimum of one year.

The basic question presented is whether the differing treatment of sexual offenders apart from other criminal offenders adopted in Article I, Section 9, of the Constitution of Nebraska is a reasonable one. In resolving this question, it should be kept in mind that there exists no federal constitutional right to bail. Equally important to this determination is the right of the individual states to freely determine which types of criminal offenses are to be made subject to bail.

Th effect of the 1978 bail amendment to Article I, Section 9, of the Nebraska Constitution is to add to those offenses which are nonbailable sexual offenses involving penetration by force or against the will of the victims, where the proof is evident or the presumption great. The purpose of this amendment, according to its proponents, is the protection of society from repetition of these types of heinous crimes. It was the belief of the proponents that sexual offenders are prone to repeat sex offenses and therefore should not be granted a specific right to bail pending the resolution of the charges made against them. In overwhelmingly adopting the 1978 bail amendment, the people of the State of Nebraska affirmed the above belief that in such cases bail poses a significant danger and threat.

The people of the State of Nebraska have made a constitutionally legitimate determination that these particular sexual offenders in these specific circumstances constituted a distinct class of criminals and that members of this class should not be entitled as a matter of state constitutional right to bail. They have determined that the crime of rape where the proof is evident or the presump-

tion great is of such an inherent gravity as to preclude the admission to bail. In *Coker v. Georgia*, 433 U. S. 584 (1977), this Court commented on the crime of rape:

> It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. *Short of homicide, it is the "ultimate violation of self."* It is also a violent crime because it normally involves force, or the threat of force, or intimidation, to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage. *Because it undermines the community's sense of security, there is public injury as well.*

(Emphasis added.) 433 U. S. at 597-98.

Historically, bail has been denied when it was feared the severity of the punishment, *i. e.*, capital punishment, would jeopardize the likelihood that the accused would reappear for trial if released on bond. This case presents the question of whether a state may constitutionally deny a right to bail where it has determined that the particular class of accused persons would present a serious threat to the safety of the community if released.

While this question appears to have never been squarely addressed by this Court, the valid interests of the community's welfare were at least recognized by this Court in *Carlson v. Landon, supra,* and by Mr. Justice Douglas in an opinion in chambers in *Carbo v. United States*, 7 L. Ed. 2d 769 (1962), wherein he observed:

> One convicted of rape or murder is not necessarily turned loose on bail pending review even though

substantial questions were presented in the appeal. If, for example, the safety of the community would be jeopardized, it would be irresponsible judicial action to grant bail. As stated in United States ex rel. Estabrook v. Otis (CA8 Mo) 18 F. 2d 689, 690, "Bail should not be granted where the offense of which the defendant has been convicted is an atrocious one, and there is danger that if he is given his freedom he will commit another of like character."

A state's ability to deny bail on the basis that a community might be threatened was also recognized by Mr. Justice Douglas in an opinion in chambers in *Rehman v. California*, 13 L. Ed. 2d 17 (1964), and by Mr. Chief Justice Warren in an opinion in chambers in *Leigh v. United States*, 8 L. Ed. 2d 269 (1962). *See, also, Wansley v. Wilkerson*, 263 F. Supp. 54 (W. D. Va. 1967), and *United States v. Coparo*, 297 F. Supp. 203 (S. D. N. Y. 1969).

The Eighth Circuit below found no constitutional distinction between excessively high bail and no bail at all and held that the Eighth Amendment created a fundamental right to release on bail. In viewing Nebraska's constitutional provision against the standard of this fundamental right, they held, "The fatal flaw in the Nebraska constitutional amendment is that the state has created an irrebuttable presumption that every individual charged with this particular offense is incapable of assuring his appearance by conditioning it upon reasonable bail or is too dangerous to be granted release." The appellant takes issue with this observation. First, Nebraska's state constitutional right to bail is not denied every person charged with sexual assault but, rather, only to those who are so charged where the proof is evident or the presumption great. Secondly, while it is true that such an individual

is denied a constitutional right to bail, nothing prohibits a judge from granting bail.

If the Eighth Circuit below was analyzing Nebraska's constitutional provision in a substantive due process context, the appellant would suggest that the test for such analysis is whether or not the constitutional provision is unreasonable, arbitrary, or capricious and whether the means selected by the people of Nebraska have a real and substantial relation to the objectives sought to be achieved. *West Coast Hotel Co. v. Parrish,* 300 U.S. 379 (1937). The appellant would conclude that the State of Nebraska has met such a test.

Article I, Section 9, of the Constitution of the State of Nebraska does not create an irrebuttable presumption that all persons charged with sexual offenses involving force pose a significant danger but merely denies them the constitutional right to demand bail, the state judge being given the discretion to determine whether the proof is evident or the presumption great or to grant bail even if he so finds. Article I, Section 9, denies a person so accused a constitutional right to bail; it does not prohibit his release.

The determination of which offenses shall be bailable is a question for the people to decide. The only limitation upon the right is that the determination is reasonable and based on distinctions relevant to the purpose of the differing treatment.

The appellant submits that the people of the State of Nebraska have reasonably determined that the crime of first degree sexual assault is distinct from other crimes,

and, therefore, that the welfare of society demands that persons charged with this crime where the proof of their guilt is evident or the presumption of their guilt great not be afforded a constitutional right to bail. The above distinction is based on the undisputed fact that rape is of such a heinous nature as to pose a grave threat to society. Thus, the differing treatment between this distinct, specific, and narrow class of rapists and other criminal offenders is justified in that it is relevant to the legitimate state purpose of protecting society.

IV.

The 1978 bail amendment to Article I, section 9, of the Constitution of Nebraska does not violate any other constitutionally protected rights.

A. Nebraska's 1978 bail amendment does not violate the presumption of innocence.

The claim was made below that the 1978 bail amendment to Article I, Section 9, of the Nebraska Constitution abridged the presumption of innocence included in the Fourteenth Amendment's guarantee of due process. This argument is primarily based on dicta contained in *Stack v. Boyle, supra,* and *In re Winship,* 397 U. S. 358 (1970). For the reasons set forth below, the appellant submits that this argument is without merit.

Initially, it must be pointed out that bail has always been denied in certain cases, especially capital cases, and this has never been held to violate due process of law or any presumption of innocence. This is because the Federal Constitution clearly sanctions pretrial arrest and detention by permitting arrests on probable cause. In addi-

tion, the term "due process of law" as used in the Federal Constitution does not guarantee any specific type of procedure. It merely provides that a party is entitled in any given case to the regular procedure provided for by the law applicable to that case. Thus, the presumption of innocence, whatever it means, would become part of due process only where the applicable law extends it to a person as part of the law. *See,* Meyer, *Constitutionality of Pretrial Detention,* 60 Georgetown Law Journal 1381, 1438-49 (1972).

It is difficult to precisely define the term "presumption of innocence." In *McCormick on Evidence* (2d Ed. 1972), the authors state:

> The phrase is probably better called the "assumption of innocence" in that it describes our assumption that, in the absence of contrary facts, it is to be assumed that any person's conduct upon a given occasion was lawful. In criminal cases, the "presumption of innocence" has been adopted by judges as a convenient introduction to the statement of the burdens upon the prosecution, first of producing evidence of the guilt of the accused and, second, of finally persuading the jury or judge of his guilt beyond a reasonable doubt.

Id. at 805-06. As the above quoted passage indicates, the "presumption of innocence" primarily serves the purpose of impressing on the judge or jury that any doubts as to a defendant's guilt must be resolved in favor of the accused and that the burden of proving guilt is on the prosecution. *See, e. g., Washington v. Clemmer,* 339 F. 2d 725 (D. C. Cir. 1964); *Hairston v. United States,* 343 F. 2d 702 (D. C. Cir. 1965). *Also, see, Robertson v. United States,* 364 F. 2d 702 (D. C. Cir. 1966); *Deutch v. United States,* 367 U. S.

456 (1961); *Sinclair v. United States*, 279 U. S. 263 (1929); and *United States v. Fleischman*, 339 U. S. 349 (1950).

The "presumption of innocence" has never been specifically held by this Court to be secured by the due process clause of the Fourteenth Amendment. However, it is definitely questionable that the "presumption of innocence," as the underlying principle for the reasonable doubt standard, is protected by the due process clause.

In *In re Winship*, 397 U. S. 358 (1970), this Court held that the due process clause of the Fourteenth Amendment protected an accused in a criminal prosecution against conviction except upon proof beyond a reasonable doubt. This Court did not specifically hold that the principle of "presumption of innocence" was protected by the due process clause of the Fourteenth Amendment, but did indicate that the reasonable doubt standard provided substance for the concept of "presumption of innocence." As pointed out above, this is one of the purposes of the "presumption of innocence." Even if the principle of "presumption of innocence" is protected by the due process clause, it is difficult to determine how the adoption of the 1978 bail amendment violates or conflicts, in any way, with the purpose of a "presumption of innocence."

Apparently, the appellee relies on dicta in *Stack v. Boyle, supra*, to make this nexus. In *Stack v. Boyle, supra*, the sole question before this Court was whether statutory standards provided by federal law for setting bail in noncapital offenses were properly applied. *Stack v. Boyle, supra*, on its own terms, only applies where a person has been admitted to bail by law.

As demonstrated above, the "presumption of innocence" is in actuality not a real presumption. It has been consistently interpreted to mean nothing more than that it is for the prosecution to adduce evidence and produce persuasion beyond a reasonable doubt. Thus, even if the "presumption of innocence" is protected by the due process clause, the 1978 bail amendment adopted by the people of the State of Nebraska in no way conflicts with or violates that principle. The purpose of the 1978 bail amendment is to make nonbailable those persons charged with a sexual offense involving penetration by force, where the court finds that the proof is evident or the presumption is great, in order to protect society from further similar activity pending trial. The appellant submits that this legitimate purpose in no way conflicts with or violates the purpose of the "presumption of innocence" which is to instill in the minds of the court and the jury that the burden is on the prosecution at trial to prove, beyond a reasonable doubt, that the accused is guilty.

B. Nebraska's 1978 bail amendment does not violate the right to effective assistance of counsel.

It was asserted below that the 1978 bail amendment violates the rights of an accused to effective assistance of counsel and to freedom to prepare a defense under the Sixth and Fourteenth Amendments. The apparent logic of this contention is that an accused, who is incarcerated because he has been charged with a nonbailable offense, will not be able to effectively consult with his attorney in the preparation and investigation of his case, thus rendering any subsequent criminal conviction invalid because of inadequate investigation and preparation by counsel.

The premise upon which the above argument is based is that an accused has a constitutional right to be free from custody after being charged with a crime in order to assist in the preparation of his defense. This premise is totally fallacious and finds absolutely no support in either the Sixth or the Fourteenth Amendments.

An accused is guaranteed, as part of his right to effective assistance of counsel, that he be allowed to consult with his attorney and that his attorney be given adequate time and opportunity to prepare his defense. *See, e. g., United States v. Wheeler,* 434 F. 2d 1195 (9th Cir. 1970); *Stamps v. United States,* 387 F. 2d 993 (8th Cir. 1967); and *DeRoche v. United States,* 337 F. 2d 606 (9th Cir. 1964). The corollary of the above is that if an accused, who is being detained in custody, has competent counsel who has adequate time to prepare his defense, then the Sixth Amendment requirements are satisfied and there is no violation of due process. *See, e. g., United States ex rel. Hyde v. McMann,* 263 F. 2d 940 (2d Cir. 1959); and *Wansley v. Wilkerson,* 263 F. Supp. 54 (W. D. Va. 1967). Whether or not an accused is being detained on a nonbailable offense is irrelevant to the factors involved in determining whether the accused has been granted effective assistance of counsel.

The logical extension of the appellee's reasoning would be to render unconstitutional, as a violation of the right to effective assistance of counsel, all pretrial detentions, including those situations where a reasonable bail has been fixed which the accused is unable to meet. Obviously, this is an untenable result.

C. Nebraska's 1978 bail amendment does not violate the cruel and unusual punishment clause of the Eighth Amendment.

It was further asserted below that the 1978 bail amendment to the Nebraska Constitution violates the cruel and unusual punishment clause of the Eighth Amendment. The argument advanced in support of this contention was that the 1978 bail amendment punishes the status of being a person charged with a particular criminal offense by denying bail to all persons charged with that offense. The above argument presupposes that the denial of pretrial release and subsequent pretrial detention constitutes some form of punishment. This is clearly not true. As previously mentioned, pretrial detention has traditionally been sanctioned.

In order to invoke the protection of the cruel and unusual punishment clause of the Eighth Amendment, there must be a determination made that punishment has been imposed. In *Ingraham v. Wright*, 430 U. S. 651 (1977), this Court stated that the cruel and unusual punishment clause circumscribes the criminal process in three ways:

> [F]irst, it limits the kinds of punishment that can be imposed on those convicted of crimes, . . . second, it proscribes punishment, grossly disproportionate to the severity of the crime, . . . and third, it imposes substantive limits on what can be made criminal and punished as such.

Id. at 667. As the above quote indicates, the cruel and unusual punishment clause limits the *kinds* of punishment that can be imposed *after conviction.*

Prior to conviction, punishment is absolutely forbidden. *See, Jones v. Wittenberg*, 323 F. Supp. 93 (N. D.

Ohio 1971). In cases where a person is being detained either because he cannot afford the fee for bail bond set or because the accused has been charged with a nonbailable offense, the detainees are presumed to be innocent. The actual determination of their guilt or innocence remains for future determination. In *Hamilton v. Love*, 328 F. Supp. 1182 (E. D. Ark. 1971), in discussing whether or not the cruel and unusual punishment clause was applicable to allegations raised by persons detained in county jail pending trial, the court stated:

> The inmates of the Puloski County Jail should not be referred to as "convicts" or even "prisoners," considering the usual connotations of such terms. Furthermore, it is not really appropriate to judge the constitutionality of their incarceration by referring to the "cruel and unusual punishment" provisions of the Eighth Amendment. Having been convicted of no crime, the detainees should not have to suffer *any* "punishment," as such whether "cruel and unusual" or not.

Id. at 1191.

In conclusion, as the above authorities indicate, it is not "punishment" to be detained prior to trial. Thus, the 1978 bail amendment does not violate the cruel and unusual punishment clause of the Eighth Amendment.

CONCLUSION

The constitution of a state represents the direct and basic expression of the sovereign will of the people of that state. In order for a provision of a state constitution to be found in contravention of the Federal Constitu-

tion, it must be clearly and conclusively shown that a violation exists. The appellant respectfully submits that this burden has not been met in this case.

The excessive bail clause of the Eighth Amendment to the United States Constitution does not create a fundamental right to bail. It merely provides that excessive bail should not be required where bail is otherwise proper. Whether a particular criminal offense is bailable or nonbailable is for the Congress and the various states to decide. The weight of authority recognizes that states are free to determine which criminal offenses are to be made bailable, so long as that power to classify is not exercised in an unreasonable or arbitrary manner. The determination by the people of the State of Nebraska that persons charged with certain sexual offenses should not be granted a constitutional right to bail is clearly reasonable in light of the inherent gravity of the crime of rape and the legitimate state purpose of the protection of its citizens.

The people of the State of Nebraska have not created an impermissible irrebuttable presumption inasmuch as the state judge has the discretion to find that the proof of the guilt of persons charged with sexual offenses involving force is not evident or that the presumption of their guilt is not great. Additionally, the state has not prohibited bail being set for persons in this class but merely has declined to affirmatively grant such persons a state constitutional right to bail.

The various states and the federal government have historically been permitted, under the United States Constitution, to deny bail when it was found that to do so would lessen the likelihood that the accused would re-

appear for trial and it is concluded that it is equally constitutionally acceptable to deny bail where, as here, it is feared that the release of an individual charged with serious sexual offenses will pose a substantial threat to the safety of the citizens of the state.

It is also concluded that Article I, Section 9, of the Constitution of the State of Nebraska does not violate either the presumption of innocence if, in fact, such presumption is even applicable to pretrial incarceration nor does it violate an accused's right to the effective assistance of counsel nor can it be said that it constitutes cruel and unusual punishment.

Therefore, for the reasons set out above and the arguments made herein, the appellant respectfully concludes that the decision of the United States Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted,

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No. 80-2165

In The

Supreme Court of the United States

October Term, 1980

JAMES M. MURPHY,
District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska,

Appellant,

vs.

EUGENE L. HUNT,

Appellee.

ON APPEAL FROOM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPELLEE'S BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

I. This appeal seeks to overturn the decision of the United States Court of Appeals in *Hunt v. Roth*, 648 F. 2d 1148 (8th Cir. 1981), which found that the denial of pretrial bail to appellee Hunt by appellant state Judge Murphy under a 1978 Nebraska Constitutional amendment rendering nonbailable "sexual offenses involving penetration by force or against the will of the victim . . . where the proof is evident or the presumption great", violated Hunt's rights under the Eighth Amendment Excessive Bail Clause and the Fourteenth Amendment. This is the first case presenting to the Court the questions whether the Eighth and Fourteenth Amendments guarantee a fundamental right or liberty interest in pretrial bail in criminal cases, whether such right is protected against legislative abuse, and whether the foregoing Nebraska law violates the Excessive Bail Clause, as well as the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

II. *Duncan v. Louisiana*, 391 U. S. 145, 147-150 (1968) specified a number of tests for determining whether a right extended to criminal defendants by the Bill of Rights also binds the states under the Fourteenth Amendment. The essence of these tests requires that such a right be "fundamental in the context of the criminal processes maintained by the American States".

The fact that the Eighth Amendment states only that "(e)xcessive bail shall not be required", and does not explicitly guarantee a right to bail protected against legislative abuse, does not under the decisions of this Court, the Ninth Amendment, and the intention of the framers of the Bill of Rights preclude this Court from finding that such right is implicit in the Excessive Bail Clause as indispensable to the enjoyment of the explicit right.

This Court has employed several criteria in determining what are to be deemed fundamental explicit or implicit rights. Under these criteria, a right to pretrial bail in criminal cases which is protected against unreasonable legislative denial qualifies as a fundamental right because bail is an interest explicitly protected by the Eighth Amendment, the language of its Excessive Bail Clause is derived from the English Bill of Rights which was the latest in a series of remedies directed at hundreds of years of bail abuse in a governmental system not permitting constitutional restraints on legislative action, a primary intention of the framers of the American Bill of Rights was to control legislative power, bail has been mandated in noncapital cases by the overwhelming majority of American jurisdictions continuously since the founding of the nation, empirical studies and court decisions establish that bail is necessary to ensure the exercise of other fundamental rights, and the well-reasoned opinions of this and other courts and commentators establish that absent an implicit right to bail guaranteed against legislative abuse any remaining right to bail would be eviscerated.

III. Even should this Court conclude that bail is not a fundamental right requiring invocation of a strict scrutiny equal protection-due process testing of the challenged 1978 Nebraska bail amendment, the Court must, to remain consistent with its decisions citing other protected interests, find that pretrial bail in criminal cases is an important enough individual liberty interest to mandate evaluation of the Nebraska law under the Court's intermediate scrutiny rules.

Conceding *arguendo* that Nebraska's intention to prevent repetition of the crime of rape by defendants charged with rape during a period of pretrial release is an impor-

tant state objective, Nebraska's chosen means of doing so by denying bail to all defendants merely accused of rape is not substantially related to the achievement of its objective, as required by the "close-fit" technique of intermediate scrutiny, because there is no evidence that any significant number of accused rapists will commit rape during a period of pretrial release. Recidivism statistics generally reflecting that *some convicted* rapists have in the past committed rape or may at some time in the future repeat their crimes do not support Nebraska's assumption that any *significant number* of defendants merely *charged* with rape will commit rape *during the limited period while free on pretrial bail.* Furthermore, Nebraska's having conditioned denial of bail upon a finding that the "proof is evident or the presumption great" does not save the law from unconstitutionality because this standard is undefined by Nebraska, has been assigned many different definitions by other jurisdictions, and even assuming that it requires the State to establish a high probability of a defendant's guilt, there is no logical correlation or statistical evidence that a defendant who is probably guilty of a past rape presents any risk of committing rape while free on pretrial bail.

In addition to failing the Court's intermediate scrutiny "close fit" test, the 1978 Nebraska bail amendment also violates the intermediate scrutiny prohibition against irrebuttable presumptions by providing for no inquiry into individual dangerousness and no opportunity for a defendant merely charged with rape to show that he is not among the class of defendants who would commit rape if granted pretrial release. The State's contention that no such presumption exists because of the alleged discretion of trial courts to grant bail release even after finding that the

"proof is evident or presumption great" is refuted by a contrary interpretation of that language by the Nebraska Supreme Court.

Nebraska cannot convincingly argue that no other practical alternatives less restrictive of the individual interest in pretrial liberty are available to accomplish its objective, because many models of such legislation have been implemented in other jurisdictions and have been suggested by other authorities.

IV. This case presents to this Court a supreme test of the Bill of Rights and the rule of law in the face of a challenge by an irrational majority of the people of the State of Nebraska who, but for the intervention of the Court of Appeals below and this Court of last resort, would deny the guaranteed rights of an unpopular minority.

ARGUMENT

I. Introduction: Statement of Issues

This appeal seeks to overturn the decision of the United States Court of Appeals in *Hunt v. Roth*, 648 F. 2d 1148 (8th Cir. 1981), which found that the denial of pretrial bail to appellee Eugene Hunt by appellant State Judge Murphy (hereinafter "the State" or "Nebraska") under a 1978 Nebraska constitutional amendment rendering nonbailable "sexual offenses involving penetration by force or against the will of the victim . . . where the proof is evident or the presumption great," violated Hunt's rights under the Eighth and Fourteenth Amendments. The appeal thereby presents to the Court for the first time in nearly 200 years since enactment of the Excessive Bail Clause of the Eighth Amendment and in more than 100 years since passage of the Due Process Clause of the Four-

teenth Amendment the questions whether those clauses guarantee a fundamental right or liberty interest in pretrial bail in criminal cases, whether such right is protected equally against legislative and judicial abuse, and whether a state bail restriction such as Nebraska's violates those clauses and the Equal Protection Clause of the Fourteenth Amendment. *Hunt v. Roth*, 648 F. 2d 1148, 1155 (8th Cir. 1981); *Parker v. Roth*, 202 Neb. 850, 278 N. W. 2d 106, 112 (1979); *United States v. Edwards*, D. C. App., 430 A. 2d 1321, 1325, 1365 n. 1 (1981); *Sistrunk v. Lyons*, 646 F. 2d 64, 66 (3d Cir. 1981). A commentator has noted that "(no) constitutional right of the accused has received less judicial clarification than the Eighth Amendment prohibition against excessive bail". J. Cook, *Constitutional Rights of the Accused—Pretrial Rights* 463 (1972).

II. Pretrial bail protected against unreasonable state legislative denial is a fundamental right guaranteed by the Excessive Bail Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth.

Mr. Justice White's opinion of the Court in *Duncan v. Louisiana*, 391 U. S. 145, 147-150 (1968) specified a number of tests for determining whether a right extended to criminal defendants by the Bill of Rights is incorporated in the Fourteenth Amendment to also bind the states. Those tests include whether the suggested right is among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, . . . is basic in our system of jurisprudence, . . . a fundamental right essential to a fair trial, . . . fundamental to the American scheme of justice, . . . a procedure necessary to an Anglo-American regime of ordered liberty, . . . not necessarily fundamental to fairness in every criminal system that might be imagined but . . . fundamental in the con-

text of the criminal processes maintained by the American States." Under all of the criteria applied by the Court, a right to pretrial bail arising out of the Eighth Amendment Excessive Bail Clause and guaranteed against legislative abuse satisfies these tests of a fundamental right.

A. The Eighth Amendment's failure to state an explicit right to bail does not preclude the existence of such an implicit right.

The State of Nebraska first argues that had the framers intended the Excessive Bail Clause to establish a right to bail, they would have expressly so stated, rather than only providing: "Excessive bail shall not be required, . . ." While conceding that Eugene Hunt's argument for an implicit right to bail "may have a degree of logical appeal . . .", the State contends that the absence of an explicit right reflects a lack of intent to create it. Appellant's Brief on the Merits, 12-13.

Mr. Chief Justice Burger's recent plurality opinion in *Richmond Newspapers, Inc. v. Virginia*, 448 U. S. 555, 579-80, 100 S. Ct. 2814, 2828-29, 65 L. Ed. 2d 973, 991 (1980), holding ". . . the right to attend criminal trials is implicit in the . . . First Amendment" is only one of the latest in a long line of decisions rejecting the State's argument that only explicit rights may be recognized. His opinion pointed out that "certain inarticulated rights are implicit in enumerated guarantees" and "have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined", citing as examples the rights of association, privacy, travel, and to be presumed innocent and judged by proof beyond a reasonable doubt in a criminal trial. In adding to this incomplete list the right to attend criminal trials, the *Richmond* opinion found that without it "important aspects of freedom of speech and of the press could be eviscerated."

The Supreme Court's authority, indeed constitutional obligation, to identify and protect unspecified fundamental rights was intended by James Madison in introducing the Ninth Amendment providing: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people". See 1 *Annals of Cong.* 439 (Gales and Seaton ed. 1834). Justice Story recognized this intention in later writing that the "Bill of Rights presumes the existence of a substantial body of rights not specifically enumerated but easily perceived in the broad concept of liberty so numerous and so obvious as to preclude listing them". 3 Story, *Commentaries on the Constitution of the United States* 715-16 (1833). The leading modern statement of this principle is contained in Mr. Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 543 (1961), which asserted that this ". . . liberty (guaranteed by the Due Process Clause) is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion . . . and so on. It is a rational continuum which broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . ."

Based upon the following discussion, Eugene Hunt submits that like so many other rights identified by this Court, even though not explicitly stated in the Bill of Rights, pretrial bail guaranteed against legislative abuse is an implicit fundamental right under the Excessive Bail and Due Process Clauses.

B. The right to bail has deep historical roots in English law.

One criterion applied by the Court to identify a fundamental right protected by the Due Process Clause is whether it can be traced to early English law. See *Dun-*

e.g. v. Louisiana, 391 U.S. 145, 151 (1968) (jury trial "carried impressive credentials traced by many to Magna Carta"); *Wolf v. Colorado*, 338 U.S. 25, 28 (1949) (guarantee against unreasonable searches "enshrined in basic constitutional documents of English-speaking peoples"); *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967) (right to speedy trial "at the very foundation of our English law heritage"). Bail easily satisfies this criterion.

A recent historical study of Anglo-American bail has traced such a right as far back as seventh century England.[1] W. Duker, *The Right to Bail: A Historical Inquiry*, 42 Alb. L. Rev. 33, 34 (1977). This early English bail system had quite liberal and sophisticated rules, permitting the posting of property by the accused or the use of third party sureties, both before and after conviction, even in homicide cases. "The general purpose of the early Anglo-Saxon (bail) code was to restrain private vengeance until resort could be had to a public tribunal". Id. at 35-36. Because of repressive measures by the Plantagenets suppressing bail and other rights, Magna Carta in 1215 guaranteed that "no freeman shall be arrested or detained in prison . . . unless . . . by the law of the land". 1 Chafee, *Documents on Fundamental Human Rights*, 249, 251 (1963). Later bail abuses by sheriffs resulted in the first Statute of Westminster in 1275 and other statutes eliminating their discretionary powers and specifying bailable and nonbailable offenses. Unjustified pretrial detention

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1 A right to bail has been reported to have existed as long ago as ancient Greece. Plato is quoted as follows: "The prosecutor, in a murder charge, must at once demand bail from the defendant, and the latter shall provide three substantial securities as approved by the court. . . . If a man be unwilling or unable to provide these sureties, the court must bind and keep him, and produce him at the trial". R. Brumbaugh. *Plato for the Modern Man* 66 (1972).

of knights by Charles I led to adoption of the Petition of Right in 1628 clarifying application of Magna Carta to pretrial detention and enforcing the Statute of Westminster. When the Petition of Right was thereafter frustrated by King's Bench judges' engaging in procedural delays in granting release on bail, these loopholes were plugged by detailed release procedures spelled out in the Habeas Corpus Act of 1679. After judges then began setting prohibitively high bail, this final abuse was cured by the Bill of Rights of 1689 providing "That excessive bail ought not to be required". For more detailed summaries of this English history of bail, see Duker, supra, at 34-66, and C. Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. Pa. L. Rev. 959, 965-968 (1965).

Facts clearly emerging from this historical review are that "(t)he roots of bail extend deep into English law" (Duker, supra, at 119), and "(t)he right to be bailed in certain cases is as old as the law of England itself . . ." 1 J. Stephen, *A History of the Criminal Law of England*, 233 (1883). Another "is that relief against abusive pretrial imprisonment was one of those fundamental aspects of liberty which was of most concern during the formative era of English law". Foote, supra, at 968. A final historical observation might be that the English system succeeded in devising a remedy for each successive bail abuse imposed by various government officials.

C. The right to bail was deemed important in the American colonies and in the early years of the United States.

A second consideration invoked by this Court in identifying a fundamental right is whether its importance was recognized in the early years of this nation. See *Duncan v. Louisiana*, 391 U. S. 145, 152, 153 (1968) ("Jury trial

came to America with English colonists and received strong support from them. . . . (T)he constitution of every State entering the Union . . . in one form or another protected the right . . . in criminal cases."); *Klopfer v. North Carolina*, 386 U. S. 213, 225 (1967) (importance of speedy trial "evidenced by its guarantee in the constitutions of several of the States of the new nation"); *In re Oliver*, 333 U. S. 257, 266-267 (1948) (most early state constitutions protected public trial). Judged by this standard, bail must also be regarded as fundamental.

Many colonial charters, beginning with the Massachusetts Body of Liberties of 1641, established a right to pretrial bail in a broad range of criminal cases. As early as 1682, the Frame of Government of Pennsylvania provided that "all prisoners shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident, or the presumption great." W. Duker, *The Right to Bail: A Historical Inquiry*, 42 Alb. L. Rev. 33, 80 (1977); C. Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. Pa. L. Rev. 959, 974-975 (1965). This Pennsylvania right to bail was adopted nearly verbatim by the Continental Congress in the Northwest Ordinance of 1787[2], by Congress in the Judiciary Act of 1789 (1 Stat. 91 No. 33); and, as we shall later see, by the constitutions and in a few instances the statutes of the overwhelming majority of states, which have maintained it to this day.

The historical debate over whether the Excessive Bail Clause was intended to restrain only judicial, or both judicial and legislative abuse arises out of the ambiguity of the clause's simple language "Excessive bail shall not be

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2 An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, Art. II, 22 *Journals of the Continental Congress* 334 (1787), reprinted in 1 Stat. 50 n. (a).

required . . . ", the early history of the clause, and the absence of congressional debate clarifying its meaning.[3] The leading recent proponent of the narrow reading is Duker, a nonlawyer, who generally argues that because this language originated with the English Bill of Rights of 1689, which was only intended to bind judges, as well as the Declaration of Rights of 1776 in Virginia, which like some other colonies, early states, and the federal government spelled out specific rights to bail only by statute, the use of the narrow language of the Excessive Bail Clause could only have been intended to leave legislatures free to designate nonbailable crimes. Duker, supra, at 77-83.

The chief representative of the expansive construction of the Excessive Bail Clause is Professor Foote, a lawyer, who contends that the language must be read against the backdrop of hundreds of years of English bail abuses and remedies, the colonial experience with liberalizing bail, and the absence of dispute about bail between England and the colonies, which probably explains the minimal attention bail received in the congressional deabtes. He further cites Madison's statements in support of the Bill of Rights, stressing the need to go beyond the English system by restraining the legislative branch . . . "for it is the most powerful, and most likely to be abused, because it is under the least control". 1 *Annals of Cong.* 436-37 (1789-1791). Foote attributes the narrow language of the Excessive Bail Clause to the inadvertance of George Mason, a nonlawyer who had a limited understanding of

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3 This controversy was pressaged by the only comment appearing in the congressional debate on the Excessive Bail Clause: "Mr. Livermore.—The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges?" 1 *Annals of Cong.* 754 (1789-91).

the English bail system and borrowed the language of the English Bill of Rights and Virginia Declaration assuming it "alone was sufficient to epitomize the protections evolved from the long struggle against pretrial imprisonment". Foote, supra, at 975-989.[4]

While arguing from his historical perspective against the existence of a right to bail, Duker nevertheless concedes that ". . . the majority of the representatives of the American people at least have, from the first American Congress, found it desirable to establish a right to bail in non-capital cases pending trial". *Duker*, supra, at 101. Even if the Court accepts *Duker's* narrow historical interpretation of the Excessive Bail Clause, this does not preclude a finding that the clause now implies a right to bail secure against legislative abuse, for as we shall see in the following discussion, early history is only one, and not the most important, criterion to be considered in identifying a fundamental right in criminal cases.[5]

D. The right to bail has received continuous legal protection from the founding of the Nation to contemporary times.

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4 Early nondecisional support for Foote's thesis that the Excessive Bail Clause was intended to restrain legislative as well as judicial abuse is contained in Justice Story's assertion that "(i)t was, however, adopted as an admonition to *all departments* of the national government to warn them against such violent proceedings, as had taken place in England in the arbitrary reigns of some of the Stuarts". 2 J. Story, *Commentaries on the Constitution of the United States*, 610-11 (2d ed. 1851) (emphasis added).

5 One shortcoming of the recent decisions rejecting a fundamental Eighth Amendment right to bail is that they have been based almost exclusively on early historical analysis and largely ignored the Court's other criteria for recognizing such a right. *Parker v. Roth*, 202 Neb. 850, 278 N. W. 2d 106, 110-113 (1979); *United States v. Edwards*, D. C. App., 430 A. 2d 1321, 1325-1331 (1981).

Another, and perhaps the most important, factor relied upon by the Court in isolating a fundamental right, especially in criminal cases, is the extent to which it has been implemented as the nation has developed. See *Duncan v. Louisiana*, 391 U. S. 145, 150 (1968) (". . . every American State . . . uses the jury extensively . . . (and no state) has undertaken to construct such a system (without juries))"; *In re Oliver*, 333 U. S. 257, 273 (1948) (public trials are a "universal requirement of our federal and state governments"). *Duncan*, the leading modern demision stating the tests for determining a fundamental right in criminal proceedings, rejects older standards demanding for example, "if a civilized system could be imagined that would not accord the particular protection" in favor of an inquiry asking instead whether a right "is fundamental in the context of the criminal processes maintained by the American States". 391 U. S. 145, 149-150 n. 14. This test requires a primary focus on how a right has actually developed and been recognized, rather than how it may have existed in England or the United States at or prior to adoption of the Bill of Rights. Bail also easily satisfies this test.

As previously mentioned, prior to or shortly after enactment of the Eighth Amendment, the federal government and vast majority of the states adopted laws, in some cases statutory but in most constitutional, guaranteeing a right to bail in all noncapital cases.[6] Interestingly,

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6 Recognition of the pervasiveness of a right to bail in noncapital cases throughout American history appears in *United States v. Motlow*, 10 F. 2d 657, 659 (7th Cir. 1926) (Butler, Circuit Justice), quoting Chief Justice Mason of the Iowa Supreme Court in *Hight v. United States*, Morris 407, 409, 43 Am. Dec. 111, 112 in discussing the noncapital bail requirement of the Northwest Ordinance of 1787: "This is no new provision, but is in express terms incorporated into the con-

(Continued on next page)

this appeal is scheduled to be argued and decided in 1982, which marks the 300th anniversary of adoption of the original bail clause guaranteeing such right in the 1682 Frame of Government of Pennsylvania, whose language according to one recent summary is now perpetuated nearly verbatim in the constitutions of 36 American states and the statutes of several others. *Petition of Humphrey*, Okl. Cr., 601 P. 2d 103, 108-111 (1979) (appendix listing state bail provisions). As reflected in this summary, two of the remaining states have Excessive Bail Clauses like the Eighth Amendment, and five including Nebraska have since 1970 amended their constitutions with the apparent intention of permitting some form of preventive detention. With the exception of the District of Columbia, which has enacted the most elaborate preventive detention legislation, bail in noncapital cases remains a federal right as it has since the Judiciary Act of 1789. 18 U. S. C. #3146, Fed. R. Crim. P. 46 (a); D. C. Code 1973, #23-1322.

Eugene Hunt suggests that the reason there has been so little judicial consideration of the existence of a right to bail and that it has taken 200 years since passage of the Eighth Amendment for this issue to now reach the Court is that until the last decade when a few jurisdictions began enacting unprecedented bail restrictions, criminal defendants throughout the United States had enjoyed a right to pretrial bail in noncapital cases and therefore had no need to litigate whether such right was constitutionally protected.

E. The right to bail has been recognized as fundamental by this Court's own decisions.

(Continued from previous page)

stitutions of at least one-half of the states of the Union and is the rule of action in all the rest. It is merely declaratory of the common law of the United States".

Another criterion cited by this Court in recognizing a fundamental right is its own descriptions of it as such. *Duncan v. Louisiana*, 391 U. S. 145, 153-154 (1968) (jury trial has "an importance frequently recognized in the opinions of this Court"); *Gideon v. Wainwright*, 372 U. S. 335, 343-345 (1963) (the Court's "own well-considered precedents" required right to counsel). A right to bail also generally meets this criterion, but it is to a great extent because of conflicting dicta in several of the Court's opinions that this appeal is now before it for final resolution of whether such a right is to be designated as fundamental.

Most recently, Mr. Justice Blackmun's opinion of the Court in *Schilb v. Kuebel*, 404 U. S. 357, 365 (1971) stated that "(b)ail . . . is basic to our system of law . . . and the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment". See the same language regarding the fundamental nature of bail in *Herzog v. United States*, 75 S. Ct. 349, 351 (1955) (Douglas, Circuit Justice). Earlier, Mr. Chief Justice Vinson's opinion of the Court in *Stack v. Boyle*, 342 U. S. 1, 4 (1951) asserted: "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning. . . ."

Stack, supra, and *Carlson v. Landon*, 342 U. S. 524 (1952), decided during the same term, have for the past 30 years been the primary decisions fueling the debate over whether the Excessive Bail Clause safeguards a right to bail against legislative abuse. *Stack* considered the habeas corpus excessive bail claims of 12 Communist Party

members whose bail had each been set below at $50,000 following federal Smith Act indictments carrying maximum penalties of five years imprisonment and a $10,000 fine. Conceding that this bail was higher than usual for crimes carrying such penalties, the Government argued that the high bail was justified by the prior bail forfeitures of four other defendants convicted of the same offenses. In remanding the cases for individualized consideration of each defendant's release on bail, Mr. Chief Justice Vinson's opinion of the Court contained the language quoted above which has since been frequently cited in support of a general constitutional right to bail.

Carlson, supra, upheld the Attorney General's discretionary administrative denial of bail under the Internal Security Act of 1950 to alien Communists pending deportation proceedings. The Court's five-man majority opinion, joined by Chief Justice Vinson, who had written the Court's opinion in *Stack*, asserted that the Excessive Bail Clause of the English Bill of Rights was not "thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail", when it was included into our Bill of Rights "nothing was said that indicated any different concept," the "Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed . . ." (citing capital cases), and "the very language of the Amendment fails to say all arrests must be bailable". 342 U. S. 524, 545-46.

The *Carlson* dissenters summarized the chief arguments since heard in support of the application of the Excessive Bail Clause to legislative action. Mr. Justice Burton argued that the "Amendment cannot well mean that, on the one hand, it prohibits . . . bail so excessive in

amount as to be unattainable, yet, on the other hand, under like circumstances, it does not prohibit the denial of bail, which comes to the same thing". 342 U. S. 524, 569.[7] Mr. Justice Black added in dissent that the ". . . Amendment is thus (by the majority's interpretation of it to do 'no more than protect a right to bail which Congress can grant and . . . take away') reduced below the level of a pious admonition". In answer to the argument that the excessive bail prohibition of the English Bill of Rights had not applied to legislative abuse, he contended that "our Bill of Rights was written . . . to guarantee Americans greater freedom than had been enjoyed by their ancestors who had been driven from Europe by persecution".[8] 342 U. S. 524, 556-57.

The Court of Appeals below distinguished *Carlson* from this case because it had involved a denial of bail in a noncriminal context, and the *Carlson* majority had limited its holding by stating that "the Eighth Amendment does not require that bail be allowed *under the circum-*

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7 Earlier support for this view is found in the opinion of Mr. Justice Butler as Circuit Justice in *United States v. Motlow*, 10 F. 2d 657, 659 (7th Cir. 1926), admitting defendants to bail on appeal after National Prohibition Act convictions:

> The Eighth Amendment provides that 'excessive bail shall not be required'. This implies, and therefore safeguards the right to give bail at least before trial. The purpose is to prevent the practical denial of bail by fixing the amount so unreasonably high that it cannot be given. The provision forbidding excessive bail would be futile if magistrates were left free to deny bail.

8 Another argument suggested by language in this Court's decision is that the choice by Congress to join together in the Eighth Amendment both the Excessive Bail and the Cruel and Unusual Punishment Clauses, the latter not stating, but according to the more extensive congressional debates, intended to restrain legislative as well as judicial action, evidences the framers' intention to do likewise in the case of bail. See *Ingraham v. Wright*, 430 U. S. 651, 664-66 (1977).

stances of these cases". It also cited *Carlson's* requirement that the Attorney General's denial of bail could not be arbitrary and was subject to judicial review. *Hunt v. Roth*, 648 F. 2d 1148, 1161-62 (1981). See also, Note, *Preventive Detention Before Trial*, 79 Harv. L. Rev. 1489, 1499 (1966).

While the *Carlson* majority and other courts have also pointed to the traditional capital crimes exception in arguing that the Excessive Bail Clause is not binding on legislatures and does not confer an absolute right to bail, these arguments are easily answered by history and other decisions. See also, *Parker v. Roth*, 202 Neb. 850, 278 N. W. 2d 106, 110-113 (1979). The capital crimes exception antedates the Bill of Rights and was based exclusively on the assumption, inapplicable to noncapital offenses, that no bail could assure the appearance of a defendant facing a possible punishment of death. 4 W. Blackstone, *Commentaries on the Laws of England*, 293-294 (4th Ed. 1770); *United States v. Kennedy*, 618 F. 2d 557, 559 (9th Cir. 1980).

These decisions and the State in this appeal also contend that the capital crimes exception negates an "absolute" right to bail, for which the State assumes Eugene Hunt is arguing. Appellant's Brief on the Merits, 12, 17, 23. Of course, no right, fundamental or otherwise, is absolute. For example, jury trial is not required for petty offenses. *Duncan v. Louisiana*, 391 U. S. 145, 160 (1968); counsel is not required for defendants in criminal cases where there is no sentence of imprisonment. *Argersinger v. Hamlin*, 407 U. S. 25, 37 (1972); and even the most preferred fundamental right, First Amendment speech, has its exceptions for certain language which defames, is obscene, interferes with security during war, is merely com-

mercial, or incites to violence. *Young v. American Mini Theatres*, 427 U. S. 50, 65-70 (1976). Eugene Hunt is in fact only arguing here for a fundamental right to pretrial bail guaranteed against *unreasonable* denial, which right in order not to be eviscerated must prevent unreasonable *legislative* as well as judicial denial of bail.[9]

F. The right to bail is necessary to protect the exercise of other fundamental rights.

A last criterion applied by the Court to identify a fundamental right is whether it is necessary to protect other rights. *Gideon v. Wainwright*, 372 U. S. 335, 343-44 (1963) (counsel "essential to a fair trial"); *Mapp v. Ohio*, 367 U. S. 643, 656 (1961) (exclusionary rule necessary "to compel respect for the constitutional guaranty" against unreasonable searches); *Coleman v. Alabama*, 399 U. S. 1, 8-9 (1970) (pretrial counsel required to protect other Sixth Amendment rights); *Duncan v. Louisiana*, 391 U. S. 145, 150 (1968) ("criminal . . . framework . . . and procedures . . . complement . . . and have developed . . . in reliance upon jury trial"). Bail also satisfies this final consideration.

Empirical studies have demonstrated that defendants not released on bail plead guilty more often, have a higher rate of conviction, and receive more prison sentences than those released on bail. After evaluating all other factors which might explain these disparities, the studies con-

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9 For recent opinions of judges of this and other federal courts agreeing with Hunt and the Court of Appeals below that the Eighth Amendment's prohibition against excessive bail must also proscribe unreasonable denial of bail, including denial by legislatures, see *United States v. Edwards*, D. C. App., 430 A. 2d 1321, 1365-68 (Mack, J., dissenting); *Trimble v. Stone*, 187 F. Supp. 483, 484-85 (D. D. C. 1960); *Sellers v. United States*, 89 S. Ct. 36, 38 (1968) (Black, Circuit Justice); *United States ex rel. Goodman v. Kehl*, 456 F. 2d 863, 868 (2d Cir. 1972).

cluded that the differences could only be explained by the defendants' status as detained or free on bail. Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N. Y. U. L. Rev. 67 (1963) (59 percent of those released but only 23 percent of detainees had charges dismissed or were acquitted, 49 percent of those freed as against 79 percent of those held pled guilty, and 21 percent of those liberated on bail compared to 96 percent of those detained received prison sentences); Plaintiff's brief in *Bellamy v. Judges of New York City*, (App. Div., N. Y. S. Ct., 1st Dep't. 1972) 3, reprinted in H. Herman & H. Haft, *Prisoners Rights Sourcebook* 134-162 (1973) ("A first offender who is detained in lieu of bail is more than three times as likely to be convicted and almost twice as likely to get a prison sentence as a recidivist with more than ten prior arrests who is released".) See also, Rankin, *The Effect of Pretrial Detention*, 39 N. Y. U. L. Rev. 641 (1964); *The Unconstitutional Administration of Bail: Bellamy v. The Judges of New York City*, 8 Crim. L. Bull. 459-467 (1972). The foregoing studies are cited and discussed in P. Wald, *The Right to Bail Revisited: A Decade of Promise Without Fulfillment*, in S. Nagel (ed.) *The Rights of the Accused*, 178 201 n. 2 (1972). See also, Note, *Preventive Detention: An Empirical Analysis*, 6 Harv. C. R.—C. L. L. Rev. 289, 347 (1971). Certainly, if the results of these studies are correct, they graphically demonstrate that defendants not released on bail are denied fair trials in the sense that they are precluded from the same opportunity for favorable case results enjoyed by those freed on bail.

This gross disparity of favorable outcomes of cases of defendants detained when compared to those released on bail reflects the inability of detainees to exercise many

other fundamental rights dependent on bail. Chief among these is the right to counsel and to prepare a defense. The interdependence of these rights is reflected in a decision like *Bitter v. United States*, 389 U. S. 15, 17 (1967), reversing a conviction because a trial judge's revocation of bail and detention in a distant jail of the defendant who was slightly tardy in returning to Court after a trial recess amounted to impermissible punishment and "an unwarranted burden upon defendant and his counsel in the conduct of the case". The problems faced by a detained defendant in preparing a defense were detailed as follows in *Smith v. Hooey*, 393 U. S. 374, 379-80 (footnote omitted):

> Confined in a prison, . . . his ability to confer with potential defense witnesses, or even to keep track of their whereabouts is obviously impaired. And, while "evidence and witnesses disappear, memories fade, and events lose their perspective", a man isolated in prison is powerless to exert his own investigative efforts to mitigate these erosive effects of the passage of time.

See also, *Barker v. Wingo*, 407 U. S. 514, 532-33 (1972).[10]

A few of the other fundamental rights denied to defendants not free on bail include the right to maintain family relationships (*Moore v. City of East Cleveland*, 431 U. S. 94 (1977)); travel (*Shapiro v. Thompson*, 394 U. S. 618 (1969)); association (*NAACP v. Alabama*, 357 U. S.

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10 One observer has explained the much higher frequency of guilty pleas among detainees as follows:

> In light of the personal losses caused by removal from society, the uncertain and often long and brutal pretrial detention period, and the defendants' doubts of acquittal, plea bargaining becomes a defendant's most realistic course. Despite actual innocence, he confesses in order to begin serving a *known*, relatively light sentence in a more humane prison facility.

Pines, *An Answer to the Problem of Bail: A Proposal in Need of Empirical Confirmation*, 9 Colum. J. of Law and Soc. Probs. 394, 398-99 (1973).

449 (1958)); freedom of movement (*Papachristou v. City of Jacksonville*, 405 U. S. 156 (1972)); and privacy (*Roe v. Wade*, 420 U. S. 113 (1973)). As one court recently noted: "The right to be free from excessive bail underlies the entire structure of the constitutional rights enumerated in the Bill of Rights". *United States v. Abrahams*, 604 F. 2d 386, 393 (5th Cir. 1979).

In summary, because bail is an interest explicitly protected by the Eighth Amendment, the language of its Excessive Bail Clause is derived from the English Bill of Rights which was the most recent remedy directed at hundreds of years of bail abuse in a governmental system not permitting constitutional restraints on legislative action, a primary intention of the framers of the American Bill of Rights was to control legislative power, bail has been mandated in noncapital cases by the overwhelming majority of American jurisdictions continuously since the founding of the nation, empirical studies and court decisions establish that bail is necessary to ensure the exercise of other fundamental rights, and the well-reasoned opinions of this and other courts and commentators establish that absent an implicit right to bail guaranteed against unreasonable legislative and judicial denial any remaining right to bail would be eviscerated, Eugene Hunt urges the Court to declare such right implicitly fundamental and binding on the states under the Excessive Bail Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth.

III. Whether subjected to strict or only intermediate scrutiny, the 1978 bail amendment to the Nebraska Constitution must be found violative of Eugene Hunt's rights under either or both the Equal Protection or Due Process Clauses of the Fourteenth Amendment.

Until recently, the Court has adhered to a fairly rigid two-tier standard of review in its equal protection decisions. Where a classification infringes on a fundamental right or involves a suspect class, it is subject to "strict scrutiny". To survive this test, a state carries a "heavy burden of justification" to establish that its challenged classification promotes a compelling state interest and is "tailored" to constitute the least drastic means of effectuating that interest. *Zablocki v. Redhail*, 434 U. S. 374, 388 (1978); *Shapiro v. Thompson*, 394 U. S. 618, 634, 638 (1969); *San Antonio School District v. Rodriguez*, 411 U. S. 1, 16-17 (1973). Where fundamental rights or suspect classes are not implicated, the Court will invoke a "rational basis" or minimal scrutiny test under which the legislative classification will be sustained if it is rationally related to a constitutionally permissible objective. *Williamson v. Lee Optical Co.*, 348 U. S. 483, 491 (1955). In this latter case, the classification will be struck down only if it rests on grounds wholly irrelevant to the achievement of the state's objectives, and it will be upheld if any state of facts reasonably may be conceived to justify it. *McGowan v. Maryland*, 366 U. S. 420-425, 426 (1966).

Apparently because invocation of either the strict scrutiny or rational basis test will result in the nearly automatic invalidation or sustaining of a challenged classification (see *Massachusetts Board of Retirement v. Murgia*, 427 U. S. 307, 319 (1976) (Marshall J., dissenting)), and in order to provide more flexibility in equal protection analysis and results, the Court has in recent years evolved an intermediate scrutiny or "sliding-scale" approach by which it balances important but less than compelling government interests against countervailing important but less than fundamental interests of those dis-

advantaged by the classification. It has been suggested that once an important but less than fundamental individual interest has been identified, the requirements of this "middle tier" evaluation are that the challenged classification promote important government objectives and be closely and substantially related to or "fit" such objectives, that the rationale for the classification be currently advanced in the litigation and not supplied by the Court or by afterthought, and that the legal scheme permit rebuttal in individual cases. L. Tribe, *American Constitutional Law* 1082-1099 (1978).

The Court's standards of review in substantive and procedural due process contexts are similar to its equal protection analyses. For example, where fundamental rights are infringed upon, challenged legislation requires a "compelling state interest" and that the law "be narrowly drawn to express only the legitimate state interests at stake". *Roe v. Wade*, 410 U. S. 113, 155 (1973); *Moore v. City of East Cleveland*, 431 U. S. 494, 499 (1977). The sliding scale approach applicable to equal protection has also been followed with regard to due process. In procedural contexts the Court has stated that "due process is flexible and calls for such procedural protections as the particular situation demands". *Morrissey v. Brewer*, 408 U. S. 471, 481 (1972). Again, as with equal protection, the test of what procedures are required in a given situation involves a balancing of the competing interests. The Court has most recently cited the following factors to be considered in identifying procedural due process requirements: (1) the private interest affected; (2) the risk of an erroneous deprivation of such interest with the challenged procedures, and the value of other safeguards; and (3) the government interest, including the burdens

that substitute procedures would entail. *Mathews v. Eldridge*, 424 U. S. 319, 334-335 (1976).

Because of the similarity of the equal protection and due process standards of review, and since the Court itself has had some difficulty in determining which analysis may be applicable in a given situation, sometimes combining both, counsel will hereafter attempt to subject the challenged 1978 Nebraska bail amendment to a combined evaluation, indicating differences in tests where necessary. See *Zablocki v. Redhail*, 434 U. S. 374, 391, 400 (1978) (Stewart and Powell, JJ. concurring). Assuming that a finding of bail being a fundamental right would result in the application of "strict scrutiny" and almost-certain demise of the law under review, and a contrary finding that bail is of little constitutional importance would probably lead to its being automatically sustained under a rational basis test, the following discussion will concentrate on an intermediate scrutiny analysis.

A. Even should the Court decide that pretrial bail in criminal basis is not a fundamental right, it must find that pretrial liberty is of sufficient importance to justify subjecting the 1978 Nebraska bail amendment to at least intermediate constitutional scrutiny.

For the same reasons that Eugene Hunt argued earlier that pretrial bail is a fundamental right, he contends that even if the Court disagrees, it must agree that bail is of sufficient importance to require review of the challenged legislation under at least middle-tier equal protection and due process tests.

In recently upholding the District of Columbia preventive detention law and rejecting the defendant's contention that bail was a fundamental right, *United States v. Edwards*, D. C. App., 430 A. 2d 1321, 1331, 1333-34

(1981) nevertheless found that bail "is an important right" and that "pretrial detention implicates a liberty interest that requires a fair hearing within the mandates of procedural due process". A dissenter in that case appropriately noted that "this case is as much about the constitutional right to liberty as it is about the constitutional right to bail". 430 A. 2d 1321, 1365 (Mack, J. dissenting). "Liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action". *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U. S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part). Freedom of a criminal defendant before trial is even more important since *Bell v. Wolfish*, 441 U. S. 520 (1979), holding that while a defendant may not be punished prior to an adjudication of guilt in accordance with due process of law, his pretrial detention under degrading jail conditions to ensure his presence at trial or for other legitimate government purposes does not constitute punishment. The only restraints on the duration of such oppressive pretrial detention, the many prejudicial effects of which have already been detailed, are constitutional and statutory speedy trial limits of little effectiveness. See *Barker v. Wingo*, 407 U. S. 514 (1972), and Neb. Rev. Stat. § 29-1201, et seq., and case annotations thereunder.[11]

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11 Nebraska speedy trial statutes only require a trial to commence within six months after the filing of the prosecutor's information in a felony case. Neb. Rev. Stat. #29-1207. Because felony prosecutions are usually commenced after arrest with the filing of a complaint in a municipal or county (magistrate) court, and the information is not filed in the district court until the defendant is bound over for trial following a preliminary hearing or waiver thereof in the lower court, the six-month speedy trial limit is thereby effectively extended by the several days or weeks intervening between arrest and bindover. Neb. Rev. Stat. # 29-504 and

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Finally, a useful means of judging whether bail rises to a sufficient level of constitutional importance to justify evaluating government encroachments on it under the Court's equal protection or due process intermediate scrutiny rules is to juxtapose bail against some other interests which the Court has found to be important enough to require such analysis; for example: *Hampton v. Mow Sun Wong*, 426 U. S. 88 (1976) (interest of aliens in eligibility for federal competitive civil service); *Reed v. Reed*, 429 U. S. 190 (1976) (interest of women in serving as probate administrators); *Craig v. Boren*, 429 U. S. 190 (1976) (interest of males between ages 18 and 21 in purchasing 3.2% beer); *Trimble v. Gordon*, 430 U. S. 762 (1977) (interest of illegitimate children in inheriting by intestate succession from their fathers); *Vlandis v. Kline*, 412 U. S. 441 (1973) (interest of arguable state resident in obtaining higher education at affordable tuition); and *Stanley v. Illinois*, 405 U. S. 645 (1972) (interest of unwed father in custody of his children).

In the procedural due process area, the Court has found the following interests, among others, entitled to varying degrees of constitutional protection: *Goldberg v. Kelly*, 397 U. S. 254 (1970) (interest of welfare recipient to continued benefits); *Bell v. Burson*, 402 U. S. 535 (1971) (interest of uninsured motorist in retaining driver's license); *Morrissey v. Brewer*, 408 U. S. 471 (1972) (inter-

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29-506. Additionally, the Nebraska speedy trial statutes allow numerous "excluded" periods which can further extend a defendant's pretrial detention substantially beyond the underlying six month limit. See Neb. Rev. Stat. #29-1207 and cases annotated thereunder. These statutes explain the lengthy periods of pretrial detention served by many defendants held without bail during the year following enactment of the challenged 1978 Nebraska bail amendment. See the survey results in E11, J. A. 7-11.

est of parolee in not having parole revoked); *Wolff v. McDonnell*, 418 U. S. 539 (1974) (interest of prisoner in not having good behavior credits revoked); *Wisconsin v. Constantineau*, 400 U. S. 433 (1971) (interest of individual in not having name publicly posted as excessive drinker); *Perry v. Sindermann*, 408 U. S. 593 (1972) (interest of college professor in having teaching contract renewed); *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969) (interest of debtor in avoiding prejudgment wage garnishment); *Fuentes v. Shevin*, 407 U. S. 67 (1972) (interest of debtor in avoiding prejudgment replevin of household goods under conditional sale); and *Goss v. Lopez*, 419 U. S. 565 (1975) (interest of high school students in not being suspended).

Certainly, if the foregoing largely economic and convicted criminals' interests, based in most cases only upon government statutory or contract "entitlements", require intermediate scrutiny of government infringements upon them and the application of procedural safeguards, pretrial bail in criminal cases, a liberty interest of presumptively innocent persons which is explicitly guaranteed by the Bill of Rights, is entitled to at least the same degree of protection.[12]

B. While preventing the repetition of serious sexual crimes is an important governmental interest, Nebraska's choice to do so by denying bail to all defendants merely charged with such offenses where the proof is evident or presumption great is not tailored to carry out such objective, and it thereby unnecessarily infringes upon their constitutionally-protected interest in pretrial liberty.

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12 One recent commentator who supports the legislation in this case nevertheless concedes that denial of bail arguably involves a sufficient loss of personal liberty to trigger intermediate scrutiny analysis. Comment, *Forcible Rape and the Right to Bail*, 17 San Diego L. Rev. 1061, 1085-86 (1980).

The only expressed legislative purpose and the sole rationale advanced by the State of Nebraska in this litigation for the 1978 bail amendment is "the protection of society from repetition of these types of heinous crimes". Appellant's Brief on the Merits 28; E10 (Legislative History of LB 553) 08925, 25-26.[13] See *Hunt v. Roth*, 648 F. 2d 1148, 1162 (8th Cir. 1981). Eugene Hunt concedes that forcible rape is a serious crime and that the State of Nebraska has an important general governmental interest in preventing its repetition.[14] *Coker v. Georgia*, 433 U. S. 584, 597 (1977). Thus, having concluded that Hunt

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13 The introducer of this legislation, Senator Herbert Duis, argued in floor debate: "So many times these crimes are committed while out on bail. I think that you will find that this is very, very prevalent". E10 (Legislative History of LB 553) 08925. He had earlier stated in committee hearing: "I sincerely am trying my best to protect the victim. The object here is to try and stop the crime before it's been committed. Or, if a crime is committed or the possibility of being in a position to commit a crime that was about to be committed when they were first taken into custody". He added that the crime covered by the legislation was rape, which had been redefined as sexual assault. Id. at 25-26. See Neb. Rev. Stat. #28-319(a) (Reissue of 1979) and #28-408 (Rev. Stat. Supp. 1974). The chief opponent of the legislation, Senator Chambers, also acknowledged that the intent of the legislation was preventive detention. E10 (Legislative History of LB 553) 12, 15.

14 Hunt does not however concede that preventive pretrial detention is a legitimate government objective. The Court of Appeals below decided, and Eugene Hunt agrees, that it is unnecessary in this case to reach the important and unresolved constitutional question whether a denial of pretrial bail based on a finding of a defendant's dangerousness is constitutionally permissible, because "the Nebraska procedures provide for no inquiry into the dangerousness of the individual, and no such finding appears in the record of this case". *Hunt v. Roth*, 648 F. 2d 1148, 1164 (8th Cir. 1981). The ultimate resolution of the preventive detention issue would appear to depend upon whether this Court eventually characterizes pretrial detention as punishment, a question reserved by *Bell v. Wolfish*, 441 U. S. 520, 534 n. 15 (1979).

has a fundamental right or otherwise constitutionally-protected interest in pretrial liberty, and that Nebraska has an important interest in deterring repeated commission of rapes, the central remaining issue is whether the means chosen by the State to promote its interest, denial of bail to all persons charged with rape where the proof is evident or presumption great, is substantially related to the achievement of its objective. *Craig v. Boren*, 429 U. S. 190, 197 (1976). Hunt submits that it is not.

The intermediate scrutiny technique of demanding close fit has been applied, for example, in *Craig v. Boren*, 429 U.S. 190, 202 (1976) to invalidate a rule allowing the sale of beer to 18-to-20 year old females but denying the same privilege to the same age group of males based on the Court's finding that statistics reflecting a drunk driving arrest rate of .18% for females and 2% for males established "an unduly tenuous 'fit'" to justify the classification; in *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n. 20 (1976), indicating that while the total prohibition here of alien employment was unconstitutional, "citizenship could be required as a qualification for appropriately defined classes of positions"; and in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 647 n. 13 (1974), suggesting that while due process rendered invalid the challenged rule that pregnant teachers must take maternity leave after the fourth month of pregnancy, "maternity leave regulations requiring a termination of employment at some firm date during the last few weeks of pregnancy" might be permissible.

In order for a defendant to be denied bail under the challenged 1978 Nebraska scheme, only two conditions need be met: (1) he must be charged with forcible first-degree sexual assault (hereinafter sometimes called "rape"), and (2) the proof must be evident or the pre-

sumption great. For the first of these two conditions to be found perfectly tailored to the legislative purpose of preventing repetition of the covered sex crime, it would be necessary to conclude that all persons charged with that offense will commit it while free on bail. Although such perfect fit between objective and means is not required by intermediate scrutiny, the State must still demonstrate a "substantial relation" between them.

In this case, the substantial relation requirement should at least demand a showing that a significant number, if not most, accused rapists can reasonably be expected to commit rape, during pretrial release. What evidence is there to support such a showing? The legislative history and record in this case contain none other than the one naked assertion of the challenged amendment's introducer. See footnote 13, supra. What little empirical data on the subject is available outside the record refutes the legislative assumption that accused rapists commit the same crime if freed on pretrial bail. One leading study of bail crime found that not one defendant charged with sexual assault was re-arrested for the same crime during pretrial release. National Bureau of Standards, *Compilation and Use of Criminal Court Data in Relation to Pre-Trial Release of Defendants: Pilot Study* 168 (1970).[15] Another survey could find no correlation between the nature of a first offense and the type or severity of a second crime committed on bail. Note, *Preventive Detention: An Empirical Analysis*, 6 Harv. C.R.-C.L. L. Rev. 289, 342 (1971).

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15 Mr. Chief Justice Burger and others have noted the paucity of and need for more empirical data concerning the extent and other details of bail crime. W. Burger, *Annual Report on the State of the Judiciary—1980*, 66 A.B.A.J. 295, 299 (1980); W. Burger *The State of the Federal Judiciary 1979*, 65 A.B.A.J. 358, 362 (1979); Comment, *Forcible Rape and the Right to Bail*, 17 San Diego L. Rev. 1061, 1086 (1980).

It has been suggested that legislation like Nebraska's 1978 bail amendment may withstand intermediate scrutiny based upon the literature reflecting general criminal history and recidivism rates of convicted rapists. Comment, *Forcible Rape and the Right to Bail,* 17 San Diego L. Rev. 1061, 1086-87 (1980). But even assuming that *some convicted* rapists have at some time in the past, committed, or will at some indefinite time in the future again commit another rape, such data do not support Nebraska's assumption in this case that *a significant number of* defendants merely *charged* with rape will commit another rape *during the limited period while free on pretrial bail.*

It has also been argued that by further conditioning a denial of bail upon a finding that the "proof is evident or the presumption great", Nebraska's 1978 bail amendment is saved from a finding of unconstitutionality. *Id.* at 1087. See also *Parker v. Roth,* 202 Neb. 850, 278 N. W. 2d 106, 115 (1979). Assuming that this language embodied a requirement that the State establish a high probability of the defendant's guilt, it would not satisfy the "substantial relationship" test of intermediate scrutiny because neither logic, Nebraska legislative history, the record in this case, nor the few empirical studies of bail crime discussed above will support a conclusion that even a defendant charged with rape *who is probably guilty of it* presents any risk of committing rape *while free on pretrial bail.*

Moreover, the burden "proof evident or presumption great" is not defined by the Nebraska Constitution, statutes, or case law, has been assigned many different meanings by different courts, and is therefore arguably unconstitutionally vague. In order not to be declared void for vagueness, legislative language or interpretations of

it must contain ascertainable standards to guide its enforcement. *United States v. Cohen Grocery Co.*, 255 U.S. 81, 89-92 (1921). As noted, Nebraska has in no way defined this burden. The majority rule in other jurisdictions is that a charge is prima facie evidence that the "proof is evident or the presumption great", thus shifting the burden to the defendant to introduce rebuttal evidence. One minority definition is that the charge creates an irrebuttable presumption of guilt. Another is that the state bears the burden of establishing that the defendant will probably be convicted of the offense charged. For a discussion of these various definitions, see J. Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 Wis. L. Rev. 441, 444-46 (1978). Nor has this Court recognized or defined the Nebraska standard of proof. See *Addington v. Texas*, 441 U.S. 418, 423 (1979), noting and defining the "preponderance", "clear and convincing", and "reasonable doubt" burdens.

Thus left with no guidance as to its meaning, this Court and those charged with enforcing the Nebraska burden "proof evident or presumption great" must "necessarily guess at (its) meaning and differ as to its application". *Connolly v. General Construction Co.*, 269 U.S. 385, 391 (1926). The inability of Nebraska's trial courts to apply this standard to deny bail only to those defendants who are probably guilty of rape is graphically depicted in the trial exhibit reflecting that of 20 defendants denied bail whose cases had been disposed of during the first year after passage of the 1978 bail amendment, only one was convicted of the original nonbailable crime. J.A. 7-11.[16]

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16 Senator Chambers, chief opponent of the 1978 bail amendment, warned during committee hearings and floor debate

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Because the means chosen by Nebraska to promote its objective of preventing repetition of forcible first-degree sexual assault is not tailored to fit that objective and thereby sweeps too broadly by denying the fundamental interest in pretrial liberty of so many defendants who would not commit that offense if released on bail, the 1978 Nebraska bail amendment should be struck down as violative of the Fourteenth Amendment. In the language of Mr. Justice Harlan's dissent in *Poe v. Ullman*, 367 U. S. 497, 543 (1961), it amounts to an "arbitrary imposition and purposeless restraint."

C. By denying bail to all defendants merely charged with rape and not permitting Eugene Hunt and other individual defendants the opportunity to establish that they are not among the covered class of those who would commit rape while free on bail, the 1978 Nebraska bail amendment imposes an unconstitutional irrebuttable presumption.

The irrebuttable presumption doctrine is another intermediate scrutiny technique which permits governments to promote important interests through per se rules, but attempts to relieve their harsh general application by requiring that individuals, whose own interests may be infringed, be allowed to show that they are exceptions to the rules. For example, Chief Justice Stone, concurring in *Skinner v. Oklahoma*, 316 U. S. 535, 544 (1942) in invalidating a law requiring sterilization of certain habitual criminal asserted that one constitutional defect in the law was that it left the entire disadvantaged class "without opportunity to (each) individual to show that his (was) not the type of case which would justify resort to it".

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that the lack of definition of this standard of proof constituted a flaw in the law. E10 (Legislative History of LB 553) 15, 19, 08922.

Since *Skinner*, the Court has invalidated numerous laws found to create similar irrebuttable presumptions. As additional examples, see *Carrington v. Rash*, 380 U. S. 89, 96 (1965), invalidating a voting prohibition for military personnel because of the unfair irrebuttable presumption that they could never qualify as bona fide residents of the counties where they were stationed; *United States v. Brown*, 381 U. S. 437, 454 n. 29 (1965), striking down as a bill of attainder a federal statute barring all Communist Party members from serving as labor union officers because the law created an irrebuttable presumption that all Communists presented a threat, instead of leaving to other tribunals the task of sifting the harmless from the dangerous; *Shapiro v. Thompson*, 394 U. S. 618, 631 (1969), declaring unconstitutional a one-year waiting period for new residents applying for welfare because of the "nonrebuttable presumptions" that all new residents had traveled to the state to take advantage of its generous welfare benefits; *Bell v. Burson*, 402 U. S. 535 (1971), requiring an opportunity for a driver's licensee about to be suspended for lack of financial responsibility after an accident to offer evidence of absence of liability to avoid suspension; *Stanley v. Illinois*, 405 U. S. 645 (1972), mandating that an unwed father be afforded an opportunity to establish his fitness as a parent in a custody action; *Vlandis v. Kline*, 412 U. S. 441 (1973), determining that a student applying to a university from another state but requesting reduced tuition as a resident must be given a chance to prove his residence; *Cleveland Board of Education v. LaFleur*, 414 U. S. 632 (1974); requiring that a public school teacher beyond the fourth month of pregnancy be given the opportunity to demonstrate her ability to continue teaching; and *Woodson v. North Carolina*, 428 U. S. 280, 304 (1976), declaring a mandatory

death penalty unconstitutional because it treated "all persons convicted of a designated offense not as uniquely human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death".[17]

Likewise, Eugene Hunt agrees with the Court of Appeals that the 1978 Nebraska bail amendment which is the subject of this appeal, in providing "for no inquiry into the dangerousness of the individual", requiring no findings of dangerousness, and instead making "a legislative determination that an entire class of accused persons is not entitled to bail . . . has created an (unconstitutional) irrebuttable presumption that every individual charged with this offense . . . is too dangerous to be granted release". *Hunt v. Roth*, 648 F. 2d 1148, 1164 (8th Cir. 1981).

The State however now argues that there is no irrebuttable presumption because a trial judge retains the "discretion to determine whether the proof is evident or the presumption great or to grant bail even if he so finds". Appellant's Brief on the Merits 31. Eugene Hunt has already conceded that a Nebraska judge does have discretion in deciding whether the "proof is evident or presumption great". In fact, as already discussed, this is one of the fatal defects in the law because in the absence of any definition of this standard to guide trial judges in its application, they have succeeded in locking up without bail 19 defendants who have been determined to be not guilty of the nonbailable offense for every one de-

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17 See as well the earlier statement of Mr. Justice Murphy: "To . . . justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for the deprivation of rights". *Korematsu v. United States*, 323 U. S. 214, 240 (1944) (Murphy, J., dissenting).

fendant who was convicted of it. See footnote 16 and the accompanying text, supra. As for the State's contention that there is no irrebuttable presumption because trial judges have discretion to grant bail even after finding that the "proof is evident or the presumption great", the State's brief cites no authority in support of this claim, and what authority there is clearly refutes it.[18]

It is thus clear that by condemning all defendants merely charged with rape to pretrial detention upon satisfaction of a meaningless burden of proof, by providing for no inquiry into individual dangerousness, and by denying defendants the opportunity to rebut the assump-

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18 Chief Justice Krivosha's opinion of the Court in *Parker v. Roth*, 202 Neb. 850, 278 N. W. 2d 106, 113 (1979) stated in relevant part:

> It should be clearly recognized that the 1978 bail amendment does not *prohibit* bail in every case where an individual is charged with a sexual offense . . . In order for one so charged to be *ineligible* for bail, it must appear to the trial court that either the proof of the charge is evident or the presumption great. In any instance in which the court is not convinced that either the proof is evident or the presumption great, then the court is not *prohibited* from granting bail . . .
>
> We are therefore left with the question of whether the Legislature in the first instance, and the people thereafter, acted rationally and reasonably in concluding that where the proof was evident or the presumption great that an individual had committed a sexual offense . . ., *such person should not be free on bail pending trial.* (Emphasis added.)

An earlier Nebraska Attorney General's opinion requested by the legislation's introducer, Senator Duis, while it was pending, agreed: "We have concluded that a person charged with a sexual offense after such an amendment could still be admitted to bail *unless* the court found that proof was evident or the presumption was great that there had been penetration by force or against the will of the victim". E10 (Legislative History of LB 553) 4th page from the end (emphasis added).

tion upon which their imprisonment is based (that they will commit rape if released on bail), the State of Nebraska has created an unconstitutional irrebuttable presumption.

D. Numerous legislative alternatives which are less restrictive of the individual interest in pretrial liberty than Nebraska's 1978 bail amendment are available to promote its objective.

We have already considered the relative importance of individual defendants' interests in pretrial liberty on the one hand, and Nebraska's interest in preventing repetition of serious sex offenses while they remain free on bail on the other. We have also determined the grave risk, if not certainty, of erroneous deprivations of these individual interests through use of the procedures required under the 1978 Nebraska bail amendment.[19] In order to conclude this analysis, we only need consider whether practical substitute alternatives are available to accomplish Nebraska's interest without the grievous loss of individual liberty resulting from its current legislative choice. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

A review of the legislative alternatives selected by other jurisdictions to promote similar objectives may offer

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19 In addition to the bail standards contained in the challenged 1978 bail amendment to Neb. Const. Art. I, #9, Nebraska statutes supplementing it generally contain fairly common "bail reform" provisions mandating release under the least restrictive conditions necessary only to reasonably assure a defendant's appearance, and permitting a defendant to obtain a judicial review, with the assistance of counsel, of conditions which prevent his release for more than 24 hours. Neb. Rev. Stat. #29-901 to 29-901.04. However, all bail proceedings are summary matters to which the rules of evidence are inapplicable. Neb. Rev. Stat. #27-1101(4)(b). The bail review hearing in this case is typical of such Nebraska proceedings. See J.A. 12-16.

"models" of less restrictive choices available to Nebraska. In citing this legislation, Eugene Hunt does not wish to suggest that all or any of it could withstand constitutional scrutiny, but only to demonstrate the availability of less restrictive alternatives.

As previously noted, since 1970 five states, including Nebraska, and the District of Columbia as well, have adopted various forms of preventive detention legislation. See the text following footnote 6, supra. In addition to denying bail for capital crimes, Arizona and Utah permit bail to be denied to individual defendants charged with felonies alleged to have been committed while they are free on bail for other felonies, where there is specified proof of guilt of the second crime. Utah extends this denial to defendants charged with felonies while they are on probation or parole. Ariz. Const. Art. 2 #22; Utah Const. Art. I #8. Texas and Michigan have adopted the Arizona model, but generally add to it provisions for the denial of bail to certain habitual offenders. Michigan alone permits denial of bail on initial charges of specified violent felonies, but allows a defendant to exempt himself from such denial by adducing evidence that he is "not likely to flee or present a danger to any other person". Both Texas and Michigan place maximum time limits of 60 and 90 days respectively on the period during which bail may be denied, and Texas affords to the accused an expedited right of appeal. Mich. Const. Art. I #15; Tex. Const. Art. 1, #11-11a. The District of Columbia has the only remaining preventive detention legislation, which is the most complex and provides, among other features, requirements for proof of individual guilt, dangerousness, multiple procedural safeguards, and a 60 day maximum period of detention. D. C. Code 1973, #23-1322.

Comparing these preventive detention laws to Nebraska's 1978 bail amendment, it is clear that unlike Nebraska's, all of the others focus to a much greater degree on the individual dangerous propensities of defendants, either by requiring proof of multiple prior *convictions* of serious crimes, demanding evidence of the commission of a serious crime during a period of pretrial release, or at least by permitting the defendant to rebut a legal presumption of his dangerousness. The majority place time limits on pretrial detention, and some provide various other procedural safeguards, all of which are absent from the 1978 Nebraska bail amendment and related statutes.[20]

Because these six other American jurisdictions have implemented various preventive detention laws which constitute living models and proof of the availability of practical and less restrictive alternatives than Nebraska's choice, and which in fact serve to highlight the unnecessary overinclusiveness of Nebraska's law, Eugene Hunt further urges the Court to find the challenged 1978 Nebraska bail amendment unconstitutional.

IV. This case presents to the Court a classic example of the tyranny of a democratic majority over an unpopular minority whose interests are protected by Bill of Rights.

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20 Models for less restrictive preventive detention laws than Nebraska's can be found other than in existing legislation. For example, Mr. Chief Justice Burger recently suggested that determinations of dangerousness should be "based on a combination of the evidence then available and the defendant's past record, to deter crime while on bail". Unlike Nebraska's ineffective speedy trial statutes, (see footnote 11, supra), he further recommended "trial within weeks of arrest for most cases . . . " W. Burger, *Annual Report to the American Bar Association by the Chief Justice of the United States*, 67 A.B.A.J. 290 (1981). For similar and additional recent suggestions, see *United States v. Edwards*, D. C. App., 430 A. 2d 1321, 1372 (1981) (Mack, J. dissenting).

In his treatise on the American system of government, written nearly 150 years ago, Alexis de Toqueville observed:

> Another tendency, which is extremely natural to democratic nations and extremely dangerous, is that which leads them to despise and undervalue the rights of private persons. . . . (Such) rights . . . amongst democratic nations are commonly of small importance, of recent growth, and extremely precarious; the consequence is, that they are often sacrificed without regret, and almost always violated without remorse.

A. de Toqueville, *Democracy in America* 310 (R. Hefner, ed. 1956).

In proposing the Bill of Rights, Madison argued that it must be directed at the legislative branch which was the most powerful, least controlled, and most likely to be abused, but he added that he saw an even greater danger in abuse of power by the people themselves:

> The prescriptions in favor of liberty ought to be leveled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the Executive or Legislative departments of government, but in the body of the people, operating by the majority against the minority.

I. Brant, *The Bill of Rights* 54 (1965) (quoting James Madison). The fact that half of the numbered amendments of the Bill of Rights, and more than half of their total language, establish rights of criminal defendants can only reflect the framers' belief that this class constituted the most despised of minorities, the most likely to be oppressed by government and the majority of the people, and was therefore most in need of constitutional protection.

According to Senator Duis, the introducer of the 1978 Nebraska bail amendment challenged in this case, the legislation was his response to demands from his constituents who had been shocked by some unusual "heinous crimes" in his district and to a Nebraska newspaper's public opinion poll which drew a 96 percent affirmative response to a question asking whether bail should be denied to defendants charged with serious sex crimes. E10 (Legislative History of LB 553) 1-2. The vigilante spirit generated by these crimes and which culminated in the enactment of the 1978 bail amendment by more than an 80% popular vote was eloquently described by Senator Chambers, the amendment's chief opponent:

> I don't know what happened to Sell (the defendant responsible for the "heinous crimes" referred to by Senator Duis) when he was young, but I know if he had done to my wife, or my mother, or my sister, or my daughter what he did out there, and I admit it, I would probably feel like taking his head off. But I also admit that that is not my customary mode of thought. When we enact laws, and when we tamper with the Constitution, that tampering should be done by sane, calm, deliberative minds and not by those who, if they were not afraid, would put a pillow case on, a bed sheet, take a lighted torch, a bullwhip and become night riders and take somebody and put a rope around their neck and jerk them off the ground on the limb of a tree. That is the kind of spirit abroad in the land when one of these terrible crimes are committed, and the ones who are so upset by that crime will then ask the state to engage in the same kind of conduct they are condemning.

E10 (Legislative History of LB 553) 14.

Eugene Hunt submits that this case presents to this Court a supreme test of the Bill of Rights and the rule of law in the face of a challenge by an irrational ma-

jority of the people of the State of Nebraska who, but for the intervention of the Court of Appeals below and this Court of last resort, would deny the guaranteed rights of an unpopular minority. As Mr. Chief Justice Burger recently stated, the "war on crime" will not be won "by abandoning the historic guarantees of the Bill of Rights". W. Burger, *Annual Report to the American Bar Association by the Chief Justice of the United States*, 67 A. B. A. J. 290, 292 (1981). See also, Mr. Chief Justice Burger's speech in *Law Day at the White House*, 65 A. B. A. J. 929, 932 (1979). This Court has not failed in the past to strike down similarly unconstitutional majority encroachments on protected minority rights, and the result should be no different in this case. See, for example, *Reitman v. Mulkey*, 387 U. S. 369 (1967).

CONCLUSION

For the foregoing reasons, Eugene Hunt urges the Court to affirm the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES M. MURPHY, District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska,

Appellant,

v.

EUGENE L. HUNT, *Appellee.*

On Appeal from the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLEE

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 80-2165

JAMES M. MURPHY, District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska,

Appellant,

-v.-

EUGENE L. HUNT,

Appellee.

BRIEF OF AMICUS CURIAE THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLEE

STATEMENT OF INTEREST[1/]

The American Civil Liberties Union ("ACLU") is a national, nonpartisan, nonprofit organization of over 200,000 members dedicated to protecting personal liberty through a

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1/ The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court pursuant to Rule 36.2 of the Rules of this Court.

vigorous defense of the safeguards embodied in the Bill of Rights. Since its founding in 1920, the ACLU has appeared before this Court, either as counsel or amicus, on more than one thousand occasions in support of those safeguards.

Constitutional protections in the area of criminal procedure have been one of the ACLU's principal areas of concern. The ACLU has appeared in numerous criminal procedure cases before this Court, including such landmark cases as Gideon v. Wainwright, 372 U.S. 335 (1963); Miranda v. Arizona, 384 U.S. 436 (1966); Witherspoon v. Illinois, 391 U.S. 510 (1968); and Terry v. Ohio, 392 U.S. 1 (1968).

The ACLU believes that the right to be free of unreasonable pretrial detention plays a critical role in assuring fairness in the overall criminal process. The ACLU is concerned that this right is threatened by the power asserted by the State of Nebraska

in the present action categorically to detain persons charged with certain noncapital offenses prior to trial solely on the basis of probable guilt. The history and traditions of this country afford no precedent for such pretrial detention. The ACLU's interest here is to answer the sweeping claims of power made by the State of Nebraska and to demonstrate the patent unconstitutionality of the Nebraska pretrial detention provision.

SUMMARY OF ARGUMENT

Article I, section 9 of the Nebraska constitution was amended in 1978 categorically to deny bail to persons charged with sexual offenses involving force "where the proof is evident or the presumption great." In a comprehensive and well-reasoned opinion, the Eighth Circuit found that this Nebraska provision violates the due process guarantees applicable to the states through the fourteenth amendment. Hunt v. Roth, 648 F.2d 1148 (8th Cir. 1981), prob. juris. noted, 50 U.S.L.W. 3244 (October 6, 1981). The Nebraska provision requires the incarceration of defendants charged with forcible sexual offenses solely on the basis of probable guilt of the offense charged. Precluding the trial court from examining any of the circumstances relating to an individual defendant's likelihood of appearing for trial or even his dangerousness to the community, the Nebraska constitutional provision creates an absolute, irrebuttable presumption that anyone charged with this

one type of noncapital offense may not even be considered for bail so long as the prosecutor can offer some evidence or even a strong presumption that the defendant committed the crime which stands charged but not proven. Such an automatic denial of liberty without even the most rudimentary procedural protections is a clear violation of the guarantees of the due process clause.

The present case is not the proper occasion to resolve the serious constitutional issues raised by preventive detention of noncapital defendants based on a judicial finding of dangerousness. The State of Nebraska has attempted to frame the issues in a way that would require this Court to resolve in the context of this case those questions, which raise profound implications for the character of criminal justice in this country. The ACLU has long taken the position that alleged "dangerous" propensities are neither a traditional nor constitutionally valid basis for denying bail to a defendant

prior to trial. Nonetheless, this case -- a challenge to a three-year-old constitutional provision which comes to this Court on a record stripped of the factual setting in which the provision was invoked -- affords no basis for examining the constitutionality of preventive detention enactments, which allow denial of bail based on a finding of dangerousness. Denial of bail under the Nebraska provision is not premised on a judicial finding that an individual defendant is likely to represent a danger to the community if released. As interpreted by the Supreme Court of Nebraska, dangerousness is irrelevant to the decision to detain; as long as the evidence relating to the present charge is sufficient, the defendant is automatically "ineligible for bail." Parker v. Roth, 202 Neb. 850, 278 N.W.2d 106, 115, 117-18, cert. denied, 444 U.S. 920 (1979). Under well-settled principles of judicial restraint, this Court should refrain from addressing the propriety of preventive

detention based upon dangerousness in the abstract setting in which those questions are raised here.

This challenge to the constitutionality of the Nebraska provision presents narrow issues. The Nebraska provision denies the procedural due process guarantees of rights of confrontation and cross examination required by Specht v. Patterson, 386 U.S. 605 (1967). It prevents consideration of evidence bearing on the individual defendant's likelihood of flight or even dangerousness. The irrebuttable presumption against bail for this one class of noncapital offenders, is not based on any data or any rational basis for concluding that such defendants are less likely to appear for trial or are more likely to commit other crimes while out on bail than any other class of noncapital defendants. The provision abridges the presumption of innocence guaranteed by the due process clause. It denies an individualized determination of eligibility for pretrial release under

traditional criteria in violation of the excessive bail clause of the eighth amendment. Finally, it violates fundamental substantive guarantees "[f]or under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." Bell v. Wolfish, 441 U.S. 520, 535 (1979).

This experiment by the State of Nebraska with the liberties of the American people is patently unconstitutional on its face. This Court should hold the Nebraska provision null and void.

ARGUMENT[2/]

I.

THE BROAD CONSTITUTIONAL ISSUES RAISED BY PRETRIAL DETENTION OF CRIMINAL DEFENDANTS FOR "DANGEROUS" PROPENSITIES ARE NOT PROPERLY PRESENTED FOR ADJUDICATION IN THIS CASE

On the basis of the challenged Nebraska constitutional provision,[3/] appellee-defendant Eugene Hunt was imprisoned for 4 months prior to his trial on charges of first-degree sexual assault, nonforcible sexual assault (statutory

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2/ The ACLU wishes to acknowledge the contributions of the following students at the Harvard Law School who assisted in the preparation of this brief: Sarah Fox, Nicolas Grabar, and Laurence Shtasel.

3/ Article I, section 9, of the Nebraska constitution provides as follows:

> "All persons shall be bailable by sufficient sureties, except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." (Emphasis added.)

The underscored amendments were added in 1978 pursuant to a popular referendum.

rape) and several accompanying counts of nonsexual felonies. Because of the circumstances of this case, the record does not indicate the factual basis upon which the trial judge concluded that the evidence or presumption against the defendant precluded his being considered for bail.

Defendant initially appeared on the charges in Omaha Municipal Court, where he was admitted to bail on the nonsexual charges, but denied bail on the sexual offense charges. Defendant subsequently appeared with counsel before Douglas County District Court Judge James M. Murphy for a review of the bail denial, but because both defendant and the state's attorney stipulated to the evidentiary requirement that "the proof [be] evident or the presumption great," no inquiry was made into the factual basis for this finding. Defendant then brought a collateral action challenging the bail denial in federal court. The parties again entered into a stipulation permitting the court to rule on defendant's

claims without inquiry into the factual and procedural setting in which the decision to detain was made.

Procedural protections for those defendants who have been charged with offenses covered by the provision are, however, minimal. Nebraska does provide bail hearings for all criminal defendants, Neb. Rev. Stat. § 29-901.01 (1979), but it does not appear that defendants are entitled to counsel as a matter of right until the appeal stage of the proceeding. Neb. Rev. Stat. § 29-901.03. Moreover, the evidence presented at the hearing need not conform to the normal rules of admissibility in a court of law, Neb. Rev. Stat. § 27-1101(4)(b), so that the State is free to offer hearsay and unreliable identification testimony.

Although the State depicts this Nebraska provision as a means for "the protection of society from repetition of . . . heinous crimes" (Appellant's Brief at 28),

the provision in fact has nothing to do with dangerousness. The Nebraska provision, on its face, requires the incarceration of persons charged with sexual offenses solely on the basis of probable guilt of the offense charged. Nothing in the record suggests that trial judges are even permitted to consider dangerousness to society in determining eligibility for bail under the Nebraska provision. Indeed, as interpreted by the Supreme Court of Nebraska, such considerations are irrelevant to the decision to detain; as long as the evidence relating to the present charge is sufficient, the defendant is automatically "ineligible for bail." Parker v. Roth, supra, 278 N.W. 2d at 115, 117-18.4/

4/ Despite the State's assertion that it remains within the discretion of the trial judge to grant or deny bail even in cases where the judge is persuaded that "the proof is evident or the presumption great," (Appellant's Brief at 31), the Supreme Court of Nebraska has clearly construed the provision as requiring the denial of bail where that evidentiary requirement has been met. In Parker v. Roth, supra, the Court stated that "[i]n order for one so charged to be ineligible for bail, it must appear to the trial court that either the proof of the charge

[Footnote continued on following page

This case also comes to this Court stripped of a record as to how the provision is actually applied in the State of Nebraska. The parties' stipulation that the evidentiary standard that the "proof [be] evident or the presumption great" had been met in the present case foreclosed any possibility that the lower courts might have reversed the denial of bail for insufficiency of evidence, avoiding the need to reach federal constitutional issues. Moreover, the stipulations precluded the development of a record reflecting the manner in which the evidentiary standard is applied by trial judges in the State of Nebraska.

[Footnote continued]
is evident or the presumption great." 278 N.W.2d at 115 (emphasis added). See also id. at 117-18 ("Based upon the stipulation entered into in this case, appellant was not eligible for bail.) (emphasis added). As this Court stated in Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 274 (1940), the state court's construction of a state enactment "is binding upon us . . . For the purpose of deciding the constitutional questions appellant raises we must take the statute as though it read precisely as the highest court of the State has interpreted it."

The stipulation supplies no meaningful information, since the evidentiary standard which the parties agreed had been met itself has no commonly accepted content. The legislative history of the challenged provision provides no guidance as to the level of proof the standard was intended to require; indeed, the comments of the amendment's supporters suggest that it is within the discretion of the trial judge to decide for himself whether there is sufficient evidence to imprison a particular defendant.[5/] Nor are we aware of any case in which the Nebraska courts have interpreted the standard.[6/] Thus, this Court

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5/ See, e.g., Comments of Senator Duis during the April 12, 1978 floor debate at p. 08920 ("[T]his Constitutional amendment would require that of course the proof is evident and the presumption has to be great. The judge does not have to do this unless those factors are there and left to his discretion"); comments of Senator Labedz during the January 26, 1978 meeting of the Committee on Constitutional Revision and Recreation at p. 16 ("[T]he judge is the one who will determine it").

6/ In Parker v. Roth, 202 Neb. 850, 278 N.W.2d 106 (1979), cert. denied, 444 U.S. 920 (1979), the only case in which the Supreme Court of Nebraska has examined the state constitutional provision at issue here, the court did not

[Footnote continued on following page]

has no basis for finding that a constitutionally adequate quantum of evidence is required to satisfy that standard under state law, or that the burden of proof is placed on the appropriate party.

Although the proviso that the "proof is evident or the presumption great" has historical antecedents and was used by the Continental Congress in the Northwest Ordinance of 1787, see Foote, The Coming Constitutional Crisis of Bail I and II, 113 U. Pa. L. Rev. 959, 999, 1125, 1164-1186, 970 (1965) (hereinafter cited as "Foote Article"), and appears in a number of state constitutions, it has been interpreted in a variety of ways. As one scholar found, there is a three-way split among jurisdictions interpreting the language as to the allocation of the burden of proof; moreover, there are as many as 20 different state court formulations of the

[Footnote continued]
address itself to the meaning of the proviso that "proof is evident or presumption great" because counsel for the parties in that case had entered into a similar stipulation that its requirements had been met.

amount of proof which it requires. Thaler, Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial, 1978 Wis. L. Rev. 441, 444-46.

This is clearly not the appropriate case to resolve the complicated issues raised by preventive detention based on a judicial finding of "dangerousness" or to uphold the constitutionality of such enactments. The challenged enactment does not even pose directly the propriety of detaining defendants found to be "dangerous." Moreover, the parties' stipulation of law and fact has deprived this case of a meaningful factual foundation for such a ruling.

In similar situations, this Court has followed a policy of self-restraint, declining to rule on issues not concretely presented. This policy reflects the limitations on federal judicial power when undertaking "the most important and the most delicate of the Court's functions," that is,

deciding constitutional issues. Rescue Army v. Municipal Court, 331 U.S. 549, 569 (1947); Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461 (1945).

The broad constitutional issue that this Court is asked to resolve -- whether and in what circumstances the pretrial detention of a supposedly dangerous defendant is constitutionally permissible -- cannot be resolved on the record of this case. Too little is known about the workings of the Nebraska provision -- the standards it employs, the procedures it requires, the evidence it demands -- to uphold the constitutionality of preventive detention. As this Court stated in Speiser v. Randall, 357 U.S. 513, 520 (1958), where the vindication of legal rights depends on how the factfinder appraises the facts, "the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied." The record in this case provides no insight into

those concerns.7/

Where, as here, only a skeletal record is available, and the legal issue pressed by the State is not even posed directly, the Court should refrain from deciding broad constitutional issues dependent on a fully developed factual and legal basis. The 11 word amendment to the Nebraska constitution at issue in this case is not an enactment authorizing pretrial detention based on a judicial finding of dangerousness. The resolution of those far-reaching issues should await the proper occasion.

7/ In Socialist Labor Party v. Gilligan, 406 U.S. 583, 587 (1972), this Court declined to resolve weighty constitutional issues on the basis of such an "extraordinarily skimpy" record. See also Cowgill v. California, 396 U.S. 371 (1970) (per curiam) (Harlan, J., concurring) (stipulated statement of facts inadequate to decide constitutional questions); DeBacker v. Brainard, 396 U.S. 28, 32 (1969) (per curiam) (constitutional issue not decided due to "barrenness" of record); International Brotherhood of Teamsters v. Denver Milk Producers, Inc., 334 U.S. 809 (1948) (per curiam) ("inadequacy" of record prevents determination of constitutional issue).

II.

THE NEBRASKA PROVISION VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE IT ARBITRARILY DENIES BAIL TO A CLASS OF DEFENDANTS, EVEN WHERE A DEFENDANT IS NOT "DANGEROUS" AND POSES NO RISK OF FLIGHT

Although the issues in this case have been framed so as to request this Court to address pretrial detention of supposedly "dangerous" criminal defendants, the issue in fact presented is narrow. Regardless of the State's asserted purpose in amending its constitution, it is apparent from the face of the amended provision that it not only permits but requires the pretrial imprisonment of persons charged with one type of noncapital offenses who are not dangerous, and pose no risk of flight, merely because it "appear(s) to the trial court that either the proof is evident or the presumption great." Parker v. Roth, supra, 278 N.W.2d at 115 (1979). The question thus presented is whether the arbitrary denial of bail to this selected category of criminal defendants can be squared

with the dictates of the due process clause of the fourteenth amendment.

Under Nebraska law, the critical determination as to whether the evidence against an alleged sexual offender is sufficient to render him ineligible for bail is within the discretion of the trial judge. As we have shown, the requirement that "the proof [be] evident or the presumption great" has no established meaning, and provides no guidance as to where the burdens of production and persuasion lie, or on what quantum of evidence the trial judge is to conclude that the evidentiary requirement has been met. See In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring) (the purpose of a proper evidentiary standard is to instruct "the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions"). The Supreme Court of Nebraska, in the one case interpreting the amended provision, indicated only that it requires a showing

of some evidence in addition to the "mere filing of a charge." Parker v. Roth, supra, 278 N.W.2d at 115.

In the absence of any meaningful substantive or procedural limits on the exercise of the judge's discretion in making the determination that "the proof is evident or the presumption great," a Nebraska defendant charged with a specified sexual offense could be denied bail and imprisoned before trial on the basis of hearsay testimony by the arresting officer as to statements by the alleged victim. Moreover, because the Nebraska constitution requires that bail be denied to any defendant against whom the proof of the present charge appears sufficiently great, evidence relating to the defendant's likelihood of flight or even dangerousness has no bearing on the decision to detain. Even if the defendant were a family man with strong community ties and no history of antisocial conduct, who was prepared to offer detailed character and psychiatric evidence to show

that he was not dangerous and posed no risk of flight, the trial judge would have no choice but to detain him, as long as the judge believed there was sufficient evidence supporting the charge to satisfy the minimal requirements imposed by the vague language of the Nebraska provision.

Since the Nebraska provision effectively precludes rather than encourages inquiry into factors directly related to risk of flight or, for that matter, dangerousness, it clearly serves no purpose even conceivably related to the proper function of bail. It simply advances the point at which a defendant can be jailed for a criminal offense from the post-conviction stage to the pretrial stage. Under Nebraska law, even a convicted sexual offender might receive only a one-year sentence; yet the constitutional provision at issue here mandates the incarceration of persons merely charged with sexual offenses -- who might wait as long as a year or more for

trial[8/] -- on the basis of less evidence than would be required to convict them. The arbitrariness of this practice renders it unconstitutional under the due process clause of the fourteenth amendment.

In Specht v. Patterson, 386 U.S. 605 (1967), this Court considered a due process challenge to a Colorado procedure permitting indeterminate sentencing without full hearing of convicted sex offenders found to be a threat to the public. Noting that this procedure made "one conviction the basis for commencing another proceeding under another Act," id. at 608, providing for more severe sentencing, this Court held the Colorado procedure invalid. This Court stated:

> "Due process . . . requires that [the defendant] be

8/ The Nebraska speedy trial provisions require that a defendant be brought to trial within six months, but there are several exceptions including one for continuances sought by the prosecution to secure material evidence. See Neb. Rev. Stat. § 29-1207.

> present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed. . . . None of these procedural safeguards we have mentioned is present under Colorado's Sex Offenders Act." Id. at 610-11.

The Specht case stands for the proposition that additional punishment may not be meted out to convicted sex offenders without full due process protections. It follows a fortiori that the imposition without such procedural protections of additional punishment -- in the form of denial of pretrial release -- upon persons merely charged with sex offenses violates the dictates of the due process clause.

It cannot be questioned that the Nebraska provision encroaches upon fundamental rights to personal liberty protected by the fourteenth amendment. The due process clause, by its express terms, protects all persons

from deprivations of "life, liberty or property" without due process of law, and "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary government action." Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex, 442 U.S. 1, 18 (1979) (Powell, J., concurring), citing Ingraham v. Wright, 430 U.S. 651, 673-74 (1977); Board of Regents v. Roth, 408 U.S. 564, 572 (1972). For the criminal defendant, as for any other person, the interest in personal liberty is "an interest of transcending value," Speiser v. Randall, supra, 357 U.S. at 525; it is not extinguished simply because a person has been charged with a criminal offense.

To confine a defendant to jail pending trial is to deprive him of his liberty altogether. Defendants awaiting trial are often housed under conditions worse than those afforded to convicted and sentenced felons. See generally L. Katz, Justice is the Crime:

Pretrial Delay in Felony Cases 56-58 (1972). Where "reasonably necessary" to the operation of the detention facility, they may be required to submit to the same harsh and restrictive security measures applied to prison inmates. Bell v. Wolfish, 441 U.S. 520 (1979). The impact on the individual can be devastating: "It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time." Barker v. Wingo, 407 U.S. 514, 532-33 (1972).

Detainees subject to such oppressive conditions have been found to be more likely to plead guilty.9/ Persons subject to pretrial incarceration are also more likely to be convicted if tried, and more likely to receive

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9/ One study of several hundred New York City detainees found that 79 percent of those defendants who were detained pled guilty compared with only 49 percent of those who were released. The Unconstitutional Administration of Bail: Bellamy v. The Judges of New York City, 8 Crim. L. Bull. 459, 467 (1972) (hereinafter cited as "Bellamy Study").

harsher sentences if convicted.[10] This is hardly surprising, given that the incarcerated defendant cannot freely consult with his lawyer, is more readily available for police interrogation, and appears in court in the custody of police. The difficulties the defendant may face in preparing his defense were graphically described by this Court in Smith v. Hooey, 393 U.S. 374, 379-80 (1969):

> "Confined in a prison, . . . his ability to confer with potential defense witnesses, or even to keep track of their whereabouts is obviously impaired. And, while 'evidence and witnesses disappear, memories fade, and events lose their perspective,' a man isolated in prison is powerless to

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10/ The two major studies in this area isolated several factors traditionally thought relevant to the disposition of a case, including previous record, family relationships, and employment stability. The researchers held these factors constant, and found that there was a causal relationship between detention and unfavorable disposition of the case. Rankin, The Effect of Pretrial Detention, 39 N.Y.U. L. Rev. 641 (1964); Bellamy Study, supra; see also Zeisel, Bail Revisited, 1979 Am. B. Foundation Research J. 769, 779 (1979).

> exert his own investigative efforts to mitigate these erosive effects of the passage of time."

Thus, pretrial incarceration infringes not only the defendant's interest in personal liberty but also his right to receive a fair trial, "a fundamental liberty secured by the Fourteenth Amendment." Estelle v. Williams, 425 U.S. 501, 503 (1976).11/

The Nebraska provision violates the procedural guarantees of the due process clause because the State has failed to provide for

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11/ It goes without saying that a detainee is also deprived of his right to privacy, see Roe v. Wade, 410 U.S. 113, 152-53 (1973), and to travel, see Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), his right to walk about freely, see Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), and to associate with persons of his own choice, see NAACP v. Alabama, 357 U.S. 449 (1958), as well as his freedom to choose and maintain his family relationships, see Stanley v. Illinois, 405 U.S. 645 (1972); Moore v. East Cleveland, 431 U.S. 494 (1977). "Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent." Barker v. Wingo, supra, 407 U.S. at 533.

procedures to ensure that a defendant subject to pretrial incarceration receives a meaningful hearing before he is deprived of his liberty. As noted above, defendants in Nebraska have no right to counsel at the initial bail hearing, and because the normal rules of evidence do not apply at bail hearings, they have no right to confront the witnesses against them. While such a hearing might be adequate to protect the interests of a defendant in a typical bail proceeding, where the presumption is that the defendant will be released and the only issue is the amount at which bail will be set, it is wholly inadequate to protect the interests of a defendant who faces automatic imprisonment if the trial judge decides that the proof against him is "evident."

The absence of confrontation rights alone constitutes a denial of due process, for even in dealing with the "conditional liberty" interest of convicted felons, Morrisey v. Brewer, 408 U.S. 471, 480 (1972),

this Court has held that confrontation rights must be provided at preliminary hearings to revoke parole, Morrisey, 408 U.S. at 487, or probation, Gagnon v. Scarpelli, 411 U.S. 778, 782 & n.5 (1973), and at hearings to consider transfer of a prisoner to a mental hospital, Vitek v. Jones, 445 U.S. 480, 496 (1980). As the Court said in Goldberg v. Kelly, 397 U.S. 254, 269 (1970), where confrontation was mandated in welfare termination hearings: "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." See also Greene v. McElroy, 360 U.S. 474, 496-97 (1959).

The dangers posed by the absence of procedural safeguards for sex offense defendants facing pretrial incarceration in Nebraska are aggravated by the impermissible vagueness of the evidentiary standard. In Giaccio v. Pennsylvania, 382 U.S. 399 (1966), for example, this Court struck down on due

process grounds state legislation which authorized juries to assess costs against defendants acquitted of criminal charges without identifying the factors to be considered in determining whether assessment was appropriate in a particular case. The parallel defect in the Nebraska provision is that it permits the trial judge to make the critical factual determination on which the denial of bail turns without authoritative legislative or judicial guidance as to the quantum of evidence needed to satisfy the standard.

The inadequate procedures under the Nebraska provision also violate procedural due process by abridging the presumption of innocence guaranteed by the fourteenth amendment. "The principle that there is a presumption of innocence in favor of the accused . . . lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895); accord Taylor v. Kentucky, 436 U.S. 478, 483

(1978). The presumption is accordingly incorporated in the protections of the due process clause of the fourteenth amendment. In re Winship, supra, 397 U.S. at 361-64 (1970).

This Court held in Stack v. Boyle, 342 U.S. 1 (1951), that enforcement of the presumption of innocence requires a right to a meaningful individualized hearing on eligibility for pretrial release:

> "Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." 342 U.S. at 4.

See also McGinnis v. Royster, 410 U.S. 263, 273 (1973).

Thus, this Court in Stack v. Boyle emphatically rejected the notion, advanced by the State in this case, that the presumption of innocence is "in actuality not a real presumption" and means "nothing more than that it is for the prosecution to adduce

evidence and produce persuasion beyond a reasonable doubt." Appellant's Brief at 35.[12] This Court has recognized instead that the right to a meaningful hearing on eligibility for pretrial release is an integral part of a protective scheme which gives meaning to the "presumption of innocence."

It is, on its face, inherently destructive of the presumption of innocence and fundamental considerations of due process to base pretrial detention on a determination without full procedural protections that the defendant is probably or presumptively guilty of the offense charged. This is an

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12/ This Court's rejection of the presumption as a basis for challenging the prison conditions at issue in Bell v. Wolfish, 441 U.S. 520, 532-33 (1979), does not support the State's position. This Court made clear in Wolfish that the initial decision to detain -- which is challenged directly in the present case -- was not at issue there. Id. at 533-34. To view this Court's comments in Wolfish as making the presumption irrelevant to the decision to detain an unconvicted defendant would be squarely inconsistent with repeated pronouncements by this Court of the "fundamental" character of that right. See id. at 582 n.11 (Stevens, J., dissenting).

impermissible shortcut through the constitutional process of determining guilt. For these reasons, the Nebraska provision should be struck down as violative of the procedural guarantees of the due process clause of the fourteenth amendment.

III.

THE NEBRASKA PROVISION VIOLATES THE GUARANTEE OF THE EIGHTH AMENDMENT APPLICABLE TO THE STATES THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT THAT "EXCESSIVE BAIL SHALL NOT BE REQUIRED"

The eighth amendment guarantees to citizens of the United States that "excessive bail shall not be required." This constitutional protection is fundamental by every test this Court has applied and therefore extends to the states through the due process clause of the fourteenth amendment. Central to the eighth amendment is a constitutional right to a meaningful individualized determination of eligibility for pretrial release -- a right the State of Nebraska has denied to persons charged with forcible sexual offenses.

A. The Excessive Bail Clause of the Eighth Amendment Renders Unconstitutional a Law Categorically Denying Pretrial Release to Noncapital Defendants Without Consideration of Relevant Individual Factors.

The right to an individual evaluation of eligibility for pretrial release, based upon relevant criteria beyond the offense charged, is fundamental to the American system of justice. This right is embodied in the guarantee of the eighth amendment that criminal defendants be free from unreasonable denial of pretrial release. The importance of this right is attested to by its uninterrupted observance in Anglo-American jurisprudence.

The institution of bail originated in medieval England, and was first codified in the Statute of Westminster the First, 1275, 3 Edw. 1, c. 15, which provided a detailed enumeration of which offenses must be bailable and which were nonbailable offenses. In succeeding centuries, additional statutes were enacted which further defined those

offenses for which bail must be set. See 4 Holdsworth, A History of English Law 526-28 (3d ed. 1945).

In addition, English bail law was shaped by three important developments: The Petition of Right of 1627, 3 Car. 1, c. 1; the Habeas Corpus Act of 1679, 31 Car. 2, c. 2; and the Bill of Rights of 1688, 1 W. & M., st. 2, c. 2. The Petition of Right was adopted by the House of Commons and approved by Charles I shortly after the King's Bench denied one Darnel release on bail, Darnel's Case, 3 How. St. Tr. 1, 221-24 (1627), apparently on the Attorney General's argument that the Magna Carta did not apply to pretrial imprisonment. Id. at 39. The Petition recited the abuse of bail in cases like Darnel's, and prayed that "no freeman in any such manner as is before mentioned, be imprisoned or detained." 3 How. St. Tr. at 224, para. X.

When cases continued to arise in which prisoners were denied bail, Parliament, in

enacting the Habeas Corpus Act of 1679, recited that "many of the King's subjects have been and hereafter may be long detained in prison, in such cases where by law they are bailable," and provided a detailed habeas corpus procedure. 1679, 31 Car. 2, c. 2. This Act eliminated the procedural obstacles to the obtaining of bail, but it gave rise in turn to a judicial practice of setting impossibly high bail in order to prevent the release of prisoners.

Accordingly, Parliament enacted a Bill of Rights, which was accepted by William and Mary, and which recited that "excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects," Bill of Rights, 1688, 1 W. & M., st. 2, c. 2, preamble, clause 10. It concluded that "Excessive bail ought not to be required . . . ." Bill of Rights, 1688, 1 W. & M., st. 2, c. 2, rights, clause 10.

English jurisprudence subsequently evolved into a system in which defendants were presumptively released unless special circumstances required that they be held pending trial. 4 W. Blackstone, Commentaries on the Laws of England 295 (4th ed. 1770). Although in some instances a justice of the peace could find that a defendant should be detained because of his particular characteristics, an individualized determination was required on the basis generally of circumstances extrinsic to the offense charged. See 2 W. Hawkins, Pleas of the Crown 140-79 (6th ed. 1787).

Building upon this historical development in England, the American system of bail established even greater protections against unreasonable detention of defendants pending trial. Several of the principal colonies, such as Massachusetts (1641) and Pennsylvania (1682), simplified the English bail structure by making bail available as

a matter of right in all but capital cases. See, e.g., Massachusetts Body of Liberties, in Massachusetts Colonial Laws 37 (Whitmore ed. 1887); Laws Agreed Upon in England, May 3, 1682, in Proceedings Relative to Calling the Conventions of 1776 and 1790 at 26, 28 (1825) (Pennsylvania); N.C. Const., Declaration of Rights § X (Dec. 18, 1776). In 1785, a bill was passed by the Virginia legislature entirely eliminating judicial discretion as to whether bail should be granted: "if the crime be punishable in life or limb, or if it be manslaughter, and there be good cause to believe the party guilty thereof, he shall not be admitted to bail; all other cases are bailable." Jefferson, Autobiography, in 1 Writings of Thomas Jefferson 62, 481 (Ford ed. 1892).

Finally, in 1787, the Northwest Ordinance was adopted by Congress. It included a guarantee to territorial residents (to "forever remain unaltered unless by common consent") that:

> "all persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great; all fines shall be moderate; and no cruel or unusual punishments shall be inflicted . . . ." An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, July 3, 1787, art. ii.

The First Congress enacted the same protections against unreasonable denial of pretrial release in the Judiciary Act of 1789 (1 Stat. 91 § 33), which expressly provided for an absolute right to bail in all noncapital federal criminal cases. Within a few days of passing the Judiciary Act, Congress adopted the eighth amendment of the Bill of Rights guaranteeing that "excessive bail shall not be required." 1 Stat. 91,§ 33 (1789).

During the course of the nineteenth century, these protections against unreasonable denial of pretrial release became virtually the universal pattern in American law. Today, 36 state constitutions declare bail available

as of right in all but capital cases,[13] and in seven others state statutes have the same effect.[14] In five more states the state constitution conformed to that pattern until amendments in the 1970s.[15] Even where bail

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13/ Ala. Const. art. I, § 16; Alaska Const. art. I, § 11; Ark. Const. art. 2, § 8; Cal. Const. art. I, § 12; Colo. Const. art. II, § 19; Conn. Const. art. I, § 8; Del. Const. art. I, § 12; Fla. Const. art. I, § 14; Idaho Const. art. I, § 6; Ill. Const. art. I, § 9; Ind. Const. art. I, § 17; Iowa Const. art. I, § 12; Kan. Const., Bill of Rights § 9; Ky. Const., Bill of Rights § 16; La. Const. art. I, § 18; Me. Const. art. I, § 10; Minn. Const. art. I, § 7; Miss. Const. art. III, § 29; Mo. Const. art. 1, § 20; Mont. Const. art. III, § 19; Nev. Const. art. I, § 7; N.J. Const. art. I, § 11; N.M. Const. art. II, § 13; N.D. Const. art. I, § 11; Ohio Const. art. I, § 9; Okla. Const. art. II, § 8; Or. Const. art. I, § 14; Pa. Const. art. I, § 14; R.I. Const., Declaration of Rights art. I, § 9; S.C. Const. art. I, § 15; S.D. Const., Bill of Rights art. VI, § 8; Tenn. Const., Declaration of Rights art. I, § 15; Vt. Const. ch. 2, § 32; Wash. Const. art. I, § 20; Wis. Const. art. 1, § 8; Wyo. Const. art. I, § 14.

14/ Ga. Code Ann. § 27-701.1 (1978); Hawaii Rev. Stat. § 804-3 (1976); Md. Rule Crim. Proc. 777; N.H. Rev. Stat. Ann. § 597:1 (1974); N.Y. Crim. Proc. § 530.10 (McKinney 1979); N.C. Gen. Stat. § 15-47 (1978); W. Va. Code § 62-1C-1(a) (1978).

15/ Ariz. Const. art. II, § 22; Mich. Const. art. I, § 15; Neb. Const. art. I, § 9; Tex. Const. art. I, § 11-a; Utah Const. art. I, § 8.

is discretionary, it must be based on a meaningful individualized hearing.16/

American jurisprudence has carved out only a few carefully circumscribed exceptions to the right of bail before trial, and each one of these is inextricably tied to preserving the integrity of the trial process itself. The capital crimes exception predates the Constitution and can be consistently found in colonial formulations of the right to bail. Its status as an historical exception to an acknowledged right is akin to that of the petty crimes exception to the right of trial by jury. Cf. District of Columbia v. Clawans, 300 U.S. 617 (1937). The exception for capital crimes stems from a fear that persons "facing a possible death sentence would likely flee regardless of what bail was set . . . ." United States v. Kennedy,

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16/ Ga. Code § 27-901; N.Y. Crim. Proc. Law (McKinney's) §§ 530.20-530.40; N.C. Gen. Stat. § 15A-534(b); Va. Code § 19.2-120.

618 F.2d 557, 559 (9th Cir. 1980). As Blackstone observed, "what is there that a man may not be induced to forfeit, to save his own life?" 4 W. Blackstone, Commentaries on the Laws of England 294 (4th ed. 1770). As the applicability of capital punishment has declined, however, the haphazard assortment of nonbailable charges, explicable only by the special penalty they carried,[17/] has declined correspondingly. See Tribe, An Ounce of Detention: Preventive Justice in the World of John Mitchell, 56 Va. L. Rev. 371, 377-78 (1970).

The additional exception recognized by modern courts for defendants who represent a threat to witnesses or judicial officers -- see, e.g., Mastrian v. Hedman, 326 F.2d 708,

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17/ The designation of crimes as capital in 1791 does not, of course, reflect that those crimes are considered serious today. Massachusetts at one time punished by death, adultery, witchcraft, blasphemy, and rebelliousness against parents. Haskins, Law and Authority in Early Massachusetts 204-11 (1960).

712 (8th Cir.), cert. denied, 376 U.S. 965 (1964); Carbo v. United States, 288 F.2d 686 (9th Cir.), cert. denied, 365 U.S. 861 (1961) -- is also tied to the need to assure a fair trial. Pretrial detention to determine competence to stand trial has a similar rationale. Bail itself has been traditionally linked to the goal of ensuring the defendant's presence at trial. These exceptions to the right to pretrial freedom are justifiable only to insure the same end as bail itself: a fair trial.

On the basis of the development of the bail system in this country, distinguished commentators have concluded that the eighth amendment was intended to confer upon noncapital defendants an absolute right to have bail set pending trial. Thus, after an exhaustive study of the origins of the eighth amendment, Professor Caleb Foote concluded:

> "From the analysis of the eighth amendment the only interpretation which seems to be consistent with its historical antecedents and

> what must have been its purpose is to find in it protection from pretrial detention which is secured against abridgement by legislation or the vagaries of judicial discretion. . . ." Foote Article, supra, at 1180.

See also Tribe, An Ounce of Detention: Preventive Justice in the World of John Mitchell, 56 Va. L. Rev. 371 (1970).

And indeed, until recently, there appeared little doubt about this purpose of the amendment. When faced with its first opportunity to delineate the right to bail, this Court in Stack v. Boyle, 342 U.S. 1 (1951), considered the right to be of constitutional dimensions:

> "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Hudson v. Parker, 156 U.S. 277, 285 (1895). Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." 342 U.S. at 4.

Subsequently, in Trimble v. Stone, 187 F. Supp. 483, 484-85 (D.D.C. 1960), Judge Holtzoff concluded:

> "The right to bail before trial, except in capital cases, is guaranteed by the Bill of Rights. The Eighth Amendment . . . has invariably been construed as guaranteeing the right to bail by necessary implication and not merely meaning that when allowed, bail shall not be excessive. . . . The right to bail pending trial is absolute, except in capital cases, no matter how vicious the offense or how unsavory the past record of the defendant may be."

The question, however, of whether the eighth amendment guarantees an absolute right to bail for noncapital defendants need not be revisited in the present case. The American criminal justice system has always been held to guarantee defendants, at a minimum, a meaningful individualized inquiry into their fitness for pretrial release, according to traditional criteria beyond the offense charged. Indeed, Stack v. Boyle,

342 U.S. 1 (1951), expressly held that an individualized determination of eligibility for bail was central to the constitutional standard embodied in the eighth amendment.[18] In its universality this requirement is comparable to the reasonable doubt standard, In re Winship, 397 U.S. 358, 363 (1970), or the public right to open trials, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579-80 (1980). Thus, the guarantee against unreasonable pretrial detention derives not only from the general commands of procedural due process but also from the specific prohibition on excessive bail.

18/ In the case chiefly relied upon by the State as support for the Nebraska provision -- Carlson v. Landon, 342 U.S. 524 (1952) -- release before deportation hearing was denied to alleged communist supporters based upon an individualized evaluation by the Attorney General rather than a magistrate. Moreover, deportation proceedings are most closely analogous to the traditional exception to a right of bail in capital cases because of the likelihood that a person would flee rather than risk the penalty of being forced to leave the country.

The Nebraska provision permits no individualized inquiry into the criteria traditionally considered in determining eligibility for pretrial release. Rather, the provision requires the pretrial imprisonment of defendants solely on the basis that it "appear[s] to the trial court that either the proof is evident or the presumption great." Parker v. Roth, supra, 278 N.W.2d at 115. There is no precedent in American jurisprudence for categorically denying pretrial release on the basis that the defendant is probably or presumptively guilty of a certain class of noncapital offenses, regardless of whether those crimes are viewed as heinous by the community.

The mere fact that the Nebraska provision dispenses with bail altogether, rather than setting an excessive bail, does not remove it from the scope of the bail clause and its concern with reasonable treatment of the accused. There has been a consensus in the federal courts that the excessive bail clause

prohibits unreasonable denials of bail as well as strictly "excessive" bail. See, e.g, Sistrunk v. Lyons, 646 F.2d 64, 70 n.23 (3d Cir. 1981); Atkins v. People of the State of Michigan, 644 F.2d 543, 549 (6th Cir.), cert. denied, 101 S. Ct. 3115 (1981); United States ex rel. Goodman v. Kehl, 456 F.2d 863, 868 (2d Cir. 1972); Mastrian v. Hedman, 326 F.2d 708, 710-11 (8th Cir.), cert. denied, 376 U.S. 965 (1964). Justice Butler, sitting on circuit, stated that "[t]he provision forbidding excessive bail would be futile if magistrates were left free to deny bail." United States v. Motlow, 10 F.2d 657, 659 (7th Cir. 1926).

It is inconsistent with both history and reason to suggest, as the State argues in the present case, that a legislature is free under the eighth amendment categorically to deny bail for an entire class of noncapital offenses. The flaw in the interpretation advanced by the State is that it would countenance intolerable consequences. Under

that interpretation, a legislature could, with constitutional impunity, deny pretrial bail for every offense, from traffic misdemeanors to felony murders. But, as the Eighth Circuit recogized in the present case, "[i]f legislative bodies are free to define any and all offenses as nonbailable, they may deprive the [eighth] amendment of any force and accused persons of any protection." Hunt v. Roth, supra, 648 F.2d at 1158.

There is not a shred of evidence to show that the framers of the Bill of Rights meant to deny American citizens the fundamental right to be free of unreasonable pretrial detention or to put the matter at the discretion of the legislature. Such an intention would have been contrary to the whole tenor of the Bill of Rights which protects against abridgement of fundamental freedoms by all three branches of government. The only interpretation of the eighth amendment which is consistent with these other guarantees is one which recognizes, at a minimum, a

fundamental right to a meaningful individualized determination of eligibility for pretrial release based on traditional criteria. An enactment such as the Nebraska provision which categorically denies pretrial release based solely on probable guilt is a blatant violation of that guarantee.

B. The Excessive Bail Clause of the Eighth Amendment Restrains States as well as the Federal Government from Unreasonable Denials of Bail.

While the eighth amendment's bail clause has not explicitly been held to control the actions of the states, the members of this Court have unanimously agreed that "the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment." Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979) (quoting Schilb v. Kuebel, 404 U.S. 357, 365 (1975)); id. at 149 n.1 (dissent). The fourteenth amendment protects a right against state action when the right

is "fundamental in the context of the criminal processes maintained by the American States." Duncan v. Louisiana, 391 U.S. 145, 150 n.14 (1968). By every standard this Court has applied, the protections of the excessive bail clause of the eighth amendment are fundamental.

In past cases, this Court has considered fundamental those rights that trace back to the early canons of English law. See Klopfer v. North Carolina, 386 U.S. 213, 223-26 (1967) (right to speedy trial "at the very foundation of our English Law Heritage"); Wolf v. Colorado, 338 U.S. 25, 28 (1949) (protection against unreasonable searches "enshrined in . . . basic constitutional documents of English-Speaking People"). By this standard, the credentials of the right to reasonable pretrial release are impeccable. Its lineage runs through the Statute of Westminster, 3 Ed., ch. 15 (1275), past Magna Carta (1215) to the Assize of Clarendon (1166) and beyond, to the earliest recorded English laws before

the Norman Conquest. See generally Duker, The Right to Bail, 42 Alb. L. Rev. 33, 34-50 (1977) (hereinafter cited as "Duker Article"). "The right to be bailed in certain cases is as old as the law of England itself." 1 J. Stephen, A History of the Criminal Law of England 233 (1883).

In determining the fundamental nature of an individual right, this Court also looks to the importance attached to it during the early years of the Republic. See Klopfer v. North Carolina, supra, 386 U.S. at 225 (fundamental nature of speedy trial right "evidenced by its guarantee in the constitutions of several of the states"); In re Oliver, 333 U.S. 257, 266-67 (1948) (early state charters also protected public trial). By this measure as well, bail is clearly fundamental. As noted above, the first body of law enacted in America established a right to be bailed in all but a limited number of cases. Massachusetts Body of Liberties, in Massachusetts Colonial Laws 37 (Whitmore ed.

1887). As was true of the right to speedy trial, the prohibition against excessive bail was included in the Virginia Declaration of Rights of 1776 even before it appeared in the eighth amendment. See Foote Article, supra, at 983. Also, as was true of the right to a public trial, such prohibitions were guaranteed by almost all of the original state constitutions. See Duker Article, supra, at 80-82.

Like other fundamental rights, the right to reasonable pretrial release has enjoyed continuing protection at both the state and federal levels. See, e.g., In re Oliver, supra, 333 U.S. at 273 (public trials are a "universal requirement of our federal and state governments"); In re Winship, supra, 397 U.S. at 363 (vital role of proof beyond a reasonable doubt in American criminal procedure makes it part of fourteenth amendment due process). The universal protection of a right to bail makes it, too, a fundamental privilege protected by the fourteenth

amendment. Even while the states were ratifying the Bill of Rights, Congress passed the Judiciary Act of 1789, guaranteeing a right to bail to those accused of noncapital federal offenses. See Foote Article, supra, at 971. That guarantee has continued unabated up to the present day. Fed. R. Crim. P. 46; 18 U.S.C. § 3146 (1976). Furthermore, as we have shown, the right to bail enjoys protection in nearly all of the states.

A final justification for incorporation of the eighth amendment into the guarantees of the due process clause is to ensure the continued protection of other fundamental rights. In Mapp v. Ohio, 367 U.S. 643 (1961), this Court directed states to comply with the exclusionary rule, not because it was a traditionally protected right, but because it was essential "to compel respect for the constitutional guaranty" against unreasonable searches. Id. at 656 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)); see also Coleman v. Alabama, 399 U.S. 1, 8-9 (1970)

(assistance of counsel prior to trial necessary to safeguard fifth amendment rights). The right to reasonable pretrial release is similarly situated: it is necessary to protect other incorporated federal rights. The right to a fair trial is at the heart of our criminal process, and, as this Court recognized in Stack v. Boyle, supra, 342 U.S. at 4, "unhampered preparation of a defense" depends on pretrial freedom.

For these reasons, the rights guaranteed by the eighth amendment apply to the states through the due process clause of the fourteenth amendment. Further, as we have shown, the Nebraska provision plainly violates even the most minimal rights to a reasonable consideration of pretrial release held to be guaranteed by the eighth amendment. Thus, the Nebraska provision should be struck down as violative not only of general due process guarantees but also of the excessive bail clause of the eighth amendment.

IV.

THE NEBRASKA PROVISION VIOLATES THE SUBSTANTIVE GUARANTEES OF THE DUE PROCESS CLAUSE BECAUSE IT REQUIRES THE IMPRISONMENT OF CRIMINAL DEFENDANTS SOLELY ON THE BASIS OF A PRETRIAL FINDING THAT THE DEFENDANT IS LIKELY TO BE CONVICTED OF THE OFFENSE CHARGED

Under the Nebraska provision, the critical determination by which defendants will be deprived of their liberty prior to trial is based exclusively on evidence relating to the likelihood that the defendant committed the offense charged. Although the State claims that the purpose of the provision is to prevent the commission of crime by defendants awaiting trial (Appellant's Brief at 28), research in the area of pretrial crime reflects that a current charge does not in itself provide a reliable basis for predicting future criminal conduct.

It is settled that any legislative assumption or judicial inference leading to the deprivation of personal liberty:

> "must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Leary v. United States, 395 U.S. 6, 36 (1969). (Emphasis supplied.)

The predictions of dangerousness cited by the State as support for the Nebraska provision are subject to this test and cannot pass it. No one can say with the "substantial assurance" required by the due process clause that the prediction of dangerousness advanced as the basis for the Nebraska provision is "more likely than not" to be accurate. Leary v. United States, supra. The two leading studies in the area found no reliable indicators for predicting which defendants are most likely to commit crimes during the period between their arrest and trial. Note, Preventive Detention: An Empirical Analysis, 6 Harv. C.R.-C.L. L. Rev. 289 (1971); National Bureau of Standards, Compilation and Use of

Criminal Court Data in Relation to Pre-Trial Release of Defendants: Pilot Study 160 (1970).[19]

Sex offenders do not, as the State suggests, represent a special class of defendants in this regard. In one recent study of defendants charged with sex offenses in the District of Columbia, 36 percent were rearrested during the pretrial period on various charges, only one of which resulted in conviction. K. Williams, The Prosecution of Sexual Assaults, 14-18 (1978). The State of Nebraska's own experience with the provision at issue here demonstrates its overinclusiveness. A survey conducted one year after adoption of the Nebraska provision[20] reflects

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19/ Both studies concluded, for example, that 5 percent of those who would have qualified for incarceration under the District of Columbia pretrial detention statute, D.C. Code 1973, § 23-1322 -- which provides for more refined efforts at prediction than the Nebraska provision -- were rearrested for violent or dangerous crimes during the pretrial period.

20/ The results of this study are set forth in the Joint Appendix at pp. 7-11.

that bail had been denied to 32 identified defendants charged with sexual offenses. Out of the 22 cases which reached final disposition, however, only two defendants were in fact convicted of forcible first degree sexual assault. Two defendants were acquitted after spending a total of 120 days in confinement, prosecutions were dismissed against 3 others, and the remainder were disposed of on convictions of or guilty pleas to bailable felonies or misdemeanors.

Because the State is, in effect, engaging in mere guesswork in amending its constitution so as to incarcerate persons charged with sex offenses pending trial, the Nebraska provision fails to achieve the measures of precision mandated by the due process clause: "[A] governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP v. Alabama, 377 U.S. 288, 307 (1964).

The due process clause mandates that in any legislation involving the curtailment of personal liberty, "less drastic" means of achieving the Congressional objective must be employed whenever feasible. Aptheker v. Secretary of State, 378 U.S. 500, 512-13 (1964); Shelton v. Tucker, 364 U.S. 479, 488 (1960). Yet individuals are deprived of their liberty under the Nebraska provision, despite the availability of numerous less drastic alternatives for dealing with commission of crime by persons awaiting trial.

Both the NBS and the Harvard studies found, for example, that more than half of all pretrial crime is committed after the first 90 days following arrest, indicating that the risk that a particular defendant might commit sexual offenses while awaiting trial could be significantly reduced simply by ensuring that the defendant is brought to trial promptly. Note, Preventive Detention: An Empirical Analysis, 6 Harv. C.R.-C.L. L.

Rev. at 389; National Bureau of Standards, supra at 165. Other alternatives, such as supervision by a parole officer or release to the custody of an agency or third party have proven effective in reducing pretrial crime, see P. Wice, Freedom for Sale, 77-78 (1974), and could be supplemented by increasing the penalties for crimes committed while on pretrial release. See generally Note, Preventive Detention Before Trial, 79 Harv. L. Rev. 1489, 1508-09 (1966).

Not only does the Nebraska provision preclude inquiry into less restrictive alternatives to pretrial imprisonment, it also prohibits the trial judge from taking into consideration any evidence unrelated to proof of the pending charge which would bear directly on whether the defendant was likely to commit sexual offenses if released.21/

21/ Even if as a result of the crime or otherwise the defendant was utterly incapacitated from committing any future sexual offense, the State of Nebraska would still insist on his incarceration as a danger to the community.

Testimony as to character or the absence of a criminal history, as well as psychiatric testimony as to the particular defendant's propensity for violent behavior, is treated as irrelevant under the Nebraska pretrial detention scheme. Thus, the only purpose in fact advanced by the Nebraska provision is an illegitimate interest in punishing persons charged with sex offenses before they are tried.

In Bell v. Wolfish, 441 U.S. 520, 535 (1979), this Court held that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." And under the tests outlined in Wolfish for determining whether a particular sanction constitutes punishment, the imprisonment of criminal defendants on the basis of evidence relating solely to guilt is plainly punitive. Not only is "the behavior to which it applies . . . already a crime," but the deprivation of liberty involved is also "excessive in

relation to the alternative purpose assigned" -- that of preventing the commission of sexual offenses by defendants awaiting trial. See Bell v. Wolfish, supra, 441 U.S. at 537-38, following Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963). Moreover, the supporters of the Nebraska provision have evidenced a clear desire for retribution based upon a single notorious incident and an undisguised assumption that all persons charged with sex offenses are guilty of those crimes.22/

Regardless of whether it is ever permissible for a state to take a defendant's criminal "propensities" into account in determining eligibility for bail -- and the

---

22/ As the State puts it: "The people of the State of Nebraska have made a . . . determination that these particular sex offenders . . . constituted a distinct class of criminals. . . . [T]he differing treatment between this distinct, specific and narrow class of rapists and other criminal offenders is justified . . . ." Appellant's Brief at 28, 32 (emphasis supplied). While rape is undoubtedly a heinous crime, that does justify punishment of persons not yet found guilty of any offense.

ACLU submits that it is not -- the Nebraska provision challenged here cannot survive constitutional scrutiny. The system which the State of Nebraska has set into motion through adoption of this amendment is not a system of preventive detention but a system which achieves pretrial punishment of persons charged with a single class of noncapital offenses. The provision must be struck down as violative of the substantive guarantees of the due process clause.

CONCLUSION

For the foregoing reasons, this Court should affirm the comprehensive and well-reasoned opinion of the Eighth Circuit in the present case. The Nebraska provision should be struck down as void and unenforceable.

Respectfully submitted,

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No. 80-2165

IN THE SUPREME COURT

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BRIEF OF THE STATE PUBLIC DEFENDER OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF APPELLEE

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BRIEF OF THE STATE PUBLIC DEFENDER OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF APPELLEE

INTEREST OF AMICUS CURIAE AND CONSENT

The State Public Defender of California is an agency of California

state government which is charged with the representation on appeal of indigent criminal defendants. The outcome of the instant case will have a substantial impact upon the pretrial right to bail of many persons being represented by this office, now and in the future, as well as upon the public as a whole. Accordingly, the State Public Defender of California is filing this brief amicus curiae in support of the appellee herein.

This brief is filed pursuant to Rule 36 of the Rules ofthe Supreme Court of the United States. Consent to the filing of the brief has been given by the Office of the Attorney General of the State of Nebraska and by the Office of the Douglas County Public Defender, Douglas County, Nebraska, counsel for appellant and appellee, respectively.

Letters reflecting such consent have been mailed to the Clerk of this Court under separate cover, and should be on file in the Clerk's office.

ARGUMENT

THE 1978 NEBRASKA CONSTITUTIONAL AMENDMENT PRECLUDING BAIL FOR ALL PERSONS ACCUSED OF FORCIBLE SEXUAL ASSAULT, WHERE THE PROOF IS EVIDENT OR THE PRESUMPTION GREAT, VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BY CREATING A CONCLUSIVE PRESUMPTION THAT RISKS IMPERMISSIBLY AN ERRONEOUS DEPRIVATION OF THE ACCUSED'S VITAL INTEREST IN PRETRIAL LIBERTY

Introduction

Article I, Section 9 of the Nebraska Constitution[1/] presents this

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1. Article I, Section 9 provides:

"All persons shall be bailable by sufficient sureties, except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the

Court with an unusual state provision affecting pretrial bail in non-capital cases. A few jurisdictions, to counsel's knowledge, have enacted "preventive detention" statutes or constitutional provisions that restrict bail for certain multiple offenders or allow trial courts to consider as a factor the "dangerousness" of the individual defendant.[2/] However, no state,

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1. (Fn. Cont.)

> proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." [Emphasis supplied.]

The emphasized words were added by amendment in 1978.

2. See D.C. Code Ann. § 23-1322; Ariz. Const. Art. II, § 22; Tex. Const. Art. V, § 11(a); Utah Const. Art. I, § 8; and Mich. Const. Art. I, § 15. See Petition of Humphrey, 601 P.2d 103, 108-111 (Okla. Crim. 1979) (appendix listing state constitutional and statutory provisions).

save Nebraska, has sought to deny bail outright to a class of non-capital defendants, based on the nature of the charged offense alone. Furthermore, states will traditionally assert the need to assure a defendant's presence at his trial as a reason for denying bail; in this case, the State of Nebraska makes no attempt at all to show that a person accused of a serious felony sex offense is more likely to flee than other non-capital defendants.

Rather, Nebraska seeks to justify the disparate, class-wide denial of bail in this case on the sole basis that the proponents of the 1978 amendment reasonably believed, and the voters so affirmed, that "sex offenders are prone to repeat sex offenses," and the purpose of denying bail to persons accused of such offenses was thus to protect

"society from repetition of these types of heinous crimes" (Appellant's Br. on Merits 28). The denial of bail for such persons, we are told, is "relevant to the legitimate state purpose of protecting society" (Appellant's Br. on Merits 32; emphasis supplied).[3] Whether this state purpose (or any other purpose apart from ensuring presence at trial) may constitutionally justify pretrial detention in the first instance is, of course, the question expressly reserved by the Court in Bell v. Wolfish, 441 U.S. 520, 534 n. 15 (1979). Yet, as the Eighth Circuit ultimately

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3. The state's posture was the same before the Court of Appeals, see Hunt v. Roth, 648 F.2d 1148, 1162 (8th Cir. 1981), and before the Nebraska Supreme Court, which had previously upheld the 1978 bail amendment against all constitutional attack, see Parker v. Roth, 202 Neb. 850, 278 N.W.2d 106, 113-114, cert. denied, 444 U.S. 920 (1979).

concluded in its Eighth Amendment analysis, the Nebraska provision effectively mandates that anyone accused of a forcible sex offense is to be considered dangerous, and indeed too dangerous as a potential recidivist, to allow his release on bail before trial. Hunt v. Roth, supra, 648 F.2d at 1164-1165. In sum, after concluding both that the Excessive Bail Clause of the Eighth Amendment applies to the States through the Fourteenth Amendment, 648 F.2d at 1155-1156, and that the Clause prohibits an unreasonable and arbitrary denial of bail as well as an excessive monetary amount, 698 F.2d at 1151-1162, the court below held that the "irrebuttable presumption" created by the Nebraska provision is indeed unreasonable and arbitrary, and on that ground violative of the Eighth Amendment, 648 F.2d at

1164-1165.

As amicus curiae we contend that the Nebraska 1978 amendment constitutes an impermissible conclusive presumption, but our argument is directed to the Fourteenth Amendment's Due Process Clause, not the Eighth Amendment as such. We submit that the Nebraska provision, as it pertains to the non-capital sub-class of defendants accused of forcible sex offenses, is indeed an irrebuttable or conclusive presumption. Moreover, even given the legitimacy, in the abstract, of Nebraska's end of protecting society, the presumption is an impermissible one, not merely because of its over-inclusive nature, but because of the pretrial detainee's significant interest in liberty and the extreme risk of an erroneous deprivation of that liberty occasioned by the means Nebraska

has employed.[4/] The Nebraska provision therefore denies due process of law.

A. Nebraska's 1978 Bail Amendment Creates A Conclusive Presumption That Anyone Accused Of A Forcible Sex Offense Is Too Dangerous To Release Before Trial (I.e., Will Commit Such An Offense If Released)

The threshold question to be answered is whether the 1978 Bail Amendment creates a conclusive presumption. Does it provide, in effect, that anyone accused of a forcible sex offense, "where the proof is evident or the presumption great," shall not be admitted to bail because of his conclu-

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4. The issue of the 1978 bail amendment being a conclusive presumption violating due process was raised below (Plaintiff-Appellant Hunt's Brief in Eighth Cir. 29-34), was considered by the court below, albeit in an Eighth Amendment context, and has been raised explicitly by counsel for appellant before this Court (Appellant's Br. on Merits 30-32).

sively presumed dangerousness? The answer is "Yes."

Nebraska now claims, apparently for the first time, that even if the state judge makes the preliminary findings of proof being "evident" or the presumption "great," he has discretion to grant bail nonetheless. (Appellant's Br. on Merits 31.) This is clearly wrong, for two reasons. First, the plain meaning of the words of the Nebraska provision (Nebraska Const., Art. I, § 9, n. 1, supra) is that where the trial court preliminarily finds that the "proof is evident or the presumption great," the accused forcible sex offender is not to be granted bail under any circumstances. The key words are: "All persons shall be bailable . . ., except . . ." (Emphasis supplied.) "Bailable" means "capable of being bailed," and a

"bailable offense" is "one for which the prisoner may be admitted to bail." Black's Law Dictionary (5th ed. 1979) 128. "Shall" is, of course, "generally imperative or mandatory;" "it has the invariable significance of excluding the idea of discretion." Black's op. cit. supra, at 1233. And "except" means "but for," "not including," or "other than." Black's, op. cit. supra, at 501. Putting these meanings together, the key phrase means: "All persons are deemed 'capable of being bailed,' 'other than' accused traitors, forcible sex offenders, and murderers." Thus, while Article I, Section 9 does not expressly state that the defendants falling under the exception are not "capable of being bailed," that is the evident meaning. The language is a good example of an unambiguous "negative pregnant." Also,

if the language were not so construed, the exception would be mere surplusage, since under the state's interpretation the trial judge always retains discretion in any event. That is a disfavored result.

Even aside from the plain meaning of the words of Article I, section 9, however, the Nebraska Supreme Court appears to have rejected authoritatively the position now taken by Nebraska, in its opinion in Parker v. Roth, supra, 202 Neb. 850, 278 N.W.2d 106, 109, 113. We submit that the following expressions by the state's highest court, in the state court litigation immediately preceding this case, show that persons falling under the exception are automatically denied bail, where the proof is evident or the presumption great:

"On April 21, 1978, L.B.

553 was enacted by the Nebraska Legislature, proposing, subject to approval by the electorate, that Article I, section 9, of the Constitution of the State of Nebraska be amended to further exclude from bail persons charged with 'sexual offenses involving penetration by force or against the will of the victim' where the proof was evident or the presumption great." 278 N.W.2d at 109; emphasis supplied.

"In order for one so charged to be ineligible for bail, it must appear to the trial court that either the proof of the charge is evident or the presumption great. In any instance in which the court is not convinced that either the proof is evident or the presumption great, then the court is not prohibited from granting bail. . . .

We are therefore left with the question of whether the Legislature in the first instance, and the people thereafter, acted rationally and reasonably in concluding that, where the proof was evident or the presumption great that an individual had committed a sexual offense involving penetration by force or against the will of the

individual, such person should not be free on bail pending trial." 278 N.W.2d at 113; emphasis supplied.

While this Court may review a state supreme court's federal constitutional holding as to a state statute or constitution, Raley v. Ohio, 360 U.S. 423, 436 (1959), the Court will not revise the state court's threshold interpretation of what its own organic law means, for that is merely a question of state law. E.g., Scripto, Inc. v. Carson, 362 U.S. 207, 210 (1960); Murdock v. Memphis, 87 U.S. (20 Wall.) 590, 626, 635-636 (1870); see generally C. Wright, Handbook on the Law of Federal Courts 542-543 (3rd ed. 1976). Thus, even assuming arguendo that Nebraska's eleventh-hour view of the Nebraska provision, as permitting residual judicial discretion, commended itself to this

Court, this Court would still not substitute its own interpretation for that of the Nebraska Supreme Court.

Thus the 1978 bail amendment does conclusively presume that an accused forcible sex offender shall be ineligible for bail, period. However, there is a more fundamental conclusive presumption here, lying just underneath the surface of the amendment: This category of non-capital felony defendants is too dangerous to society to be allowed release before trial, because the defendant will commit a forcible rape or like offense if released. This Court has in the past uncovered the true conclusive presumption underlying challenged legislation by "peeling away" one asserted governmental purpose, so as to assess other state objectives. E.g., Cleveland Board of Education v. LaFleur,

414 U.S. 632, 647 (1974); cf. McGowan v. Maryland , 366 U.S. 420, 426 (1961). See Chase, "The Premature Demise of Irrebuttable Presumptions," 47 U. Colo. L. Rev. 653, 688 ff. (1975-1976) [hereinafter Chase]. However, in this instance the Court does not need to "search" for the "real" or "objective" purpose underlying the 1978 amendment, since Nebraska has already stated very clearly what it is. Appellant's counsel has expressly identified the need to protect society from the repetition of "these types of heinous crimes" as the only purpose of the amendment. (Appellant's Br. on Merits 28.) Both the Eighth Circuit and the Nebraska Supreme Court, in their respective opinions, referred to the amendment's goal as being the protection of society from persons who were presumed to be sexual

recidivists and thus dangerous. Hunt v. Roth, supra, 648 F.2d at 1162-1165; Parker v. Roth, supra, 278 N.W.2d at 113-114. The legislative history of the bail amendment also demonstrates that the prevention of repeated forcible sex offenses was the sole objective of the proponents.[5/] The state does not contend, nor did it in the court below, that an absolute denial of bail to all persons charged with forcible rape or like offenses is necessary, or even rationally related, to assuring the

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5. Minutes of Committee on Constitutional Revision and Recreation, Hearings Concerning Legislative Bill L.B. 553 (Proposed Amendment to Nebraska Constitution, Art. I, § 9,) on Jan. 26, 1978, at p. 25 (statement of Sen. Herbert J. Duis, introducer); Nebraska Unicameral Legislature debate of April 12, 1978 on L.B. 553, at p. 08925 (incorporated in Exh. No. 10 of U.S. District Court Record in proceedings below, Civ. Nos. 80-0-361, 80-0-377, part of certified record in this Court).

presence of such persons, as a class, at trial. Hunt v. Roth, supra, 648 F.2d at 1162.

In sum, the 1978 bail amendment does establish a conclusive presumption: Anyone accused in Nebraska of forcible sexual assault, such as forcible rape, where the "proof is evident or the presumption great" as to the pending charge, is always too dangerous to be released before trial, in that he will commit such an offense while on bail. The State's characterization of the bail amendment to this Court, as continuing to allow judicial discretion in such cases, belies the plain meaning of the words, is contrary to binding state court construction, and is nowhere found in the legislative history. The basic issue now arises as to whether this conclusive presumption denies due

process of law for the affected defendants.

B. The Conclusive Presumption Of Dangerousness As To All Persons Accused Of Forcible Sex Offenses Denies Due Process Of Law As Guaranteed By The Fourteenth Amendment, In That The Pretrial Detainee's Basic Interest In Liberty Is Infringed Outright, The Risk Of Erroneous Deprivation Of That Interest Is Great, And The State's Interest, While Legitimate, Is Too Speculative To Have Sufficient Countervailing Force

The subject of conclusive or irrebuttable presumptions in due process adjudication has received considerable attention over the last decade. A brief review of this Court's opinions concerning this concept is thus pertinent in determining the constitutionality, under the Fourteenth Amendment's Due Process Clause, of the presumption in the case at bench.

1. Development of the Conclusive Presumption Doctrine Generally

From 1971 to 1974 this Court, by varying margins, struck down conclusive presumptions in a series of cases as violating due process. In Bell v. Burson, 402 U.S. 535, 541, (1971), the Court invalidated a Georgia law that appeared to presume conclusively an uninsured motorist's liability, for purposes of suspending a driver's license, if he failed to provide security for damages claimed due to an accident. In Stanley v. Illinois, 405 U.S. 645, 654-658 (1972), the Court held, by a 5-2 vote (Powell and Rehnquist, JJ., not participating,) that Illinois could not conclusively presume, for the sake of administrative convenience, that any unwed father was upon the death of the mother unfit to be a parent of his

children, thus mandating the termination of parental rights. While the state's goal of protecting children from unfit parents was legitimate, as was the goal in Bell, the state was required by due process to give the individual father an opportunity to show his fitness as a parent, because of the undeniably important private interest at stake. Id., at 654-658. In Vlandis v. Kline, 412 U.S. 441, 448-452 (1973), the Court, by a 6-3 vote, struck down as an impermissible conclusive presumption a Connecticut statute permanently characterizing a student, for purposes of charging higher tuition rates, as residing out-of-state based on his residence at the time of his admission application. The next year, in Cleveland Board of Education v. LaFleur, 414 U.S. 632, 643-648 (1974), the Court concluded, by a 7-2 margin,

that pregnant public school teachers could not uniformly be required to take maternity leave five months before the expected birth, since there was a vital private interest in family autonomy at issue, and the purpose of keeping disabled teachers out of the classroom could not justify a fixed presumption of disability for all on a rigid date. Finally, in United States Department of Agriculture v. Murry, 413, U.S. 508, 514 (1973), the Court held by a 5-4 vote that a person seeking food stamps, who had previously been declared as a tax dependent by another, non-needy household member, could not arbitrarily be declared ineligible but should be allowed to show that he is indeed needy.

All these cases, save Bell v. Burson, were marked by dissents expressing doubts as to how far the

conclusive presumption doctrine and the preference for individualized hearings might go in overruling legislative classifications. See Stanley v. Illinois, supra, 405 U.S. at 665-666 (Burger, C.J. dissenting); Vlandis v. Kline, supra, 412 U.S. at 460 (Burger, C.J., dissenting); Cleveland Board of Education v. LaFleur, supra, 414 U.S. at 657 (Rehnquist, J., dissenting); U.S. Dept. of Agriculture v. Murry, supra, 413 U.S. at 525 (Rehnquist, J. dissenting). This concern has been echoed by some commentators, but others have defended the doctrine.[6/]

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6. See, e.g., Bezanson, Some Thoughts on the Emerging Irrebuttable Presumption Doctrine, 7 Ind. L. Rev. 644, 651-654 (1974); Sewell, Conclusive and/or Substantive Due Process of Law, 27 Okla. L. Rev. 151, 153-154 (1979); Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534 (1974) [hereinafter Harvard Note]; Note, The Conclusive Presumption

More recently, the Court has upheld a state's one-year residency requirement for obtaining a divorce, Sosna v. Iowa, 419 U.S. 393 (1975) (distinguishing Vlandis), a federal conclusive presumption of complicated pneumoconiosis arising out of coal mine employment, Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) (distinguishing Vlandis and Stanley), and a federal statute prohibiting widows and their children from receiving Social Security survivors'

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6. (Fn. Cont.)

Doctrine: Equal Process or Due Protection, 72 Mich. L.Rev. 800 (1974). But see Tribe, Structural Due Process, 10 Harv. Civ. Rights -- Civ. Lib. L.Rev. 269, 305-313 (1975) [hereinafter Tribe]; Ackerman, The Conclusive Presumption Shuffle, 125 U. Pa. L.Rev. 761-810 (1977) [hereinafter Ackerman]; Chase, supra, 47 Colo. L. Rev. 633-705 (1976); Note, Irrebuttable Presumptions as an Alternative to Strict Scrutiny: From Rodriguez to LaFleur, 62 Geo. L.J. 1173, 1199-1200 (1974).

benefits unless they were related to the deceased wage earner at least nine months before his death, Weinberger v. Salfi, 422 U.S. 749 (1975) (distinguishing Vlandis, Stanley, and LaFleur). In Salfi, the Court emphasized that the challenged law was in the sphere of economic and social welare legislation, and thus individual determinations of eligibility were not required, even though some affected spouses who had married in good faith could not rebut the Congressional presumption that the short-lived marriage was a sham. 422 U.S. at 776-777. But lest one conclude for present purposes that Salfi read the conclusive presumption doctrine out of existence, it is vital to keep in mind the Salfi Court's grounds for distinguishing Stanley and LaFleur:

"Unlike the claims involved in Stanley [essential interest in child rearing] and in LaFleur [freedom of choice in matters of marriage and family life], a noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status." 422 U.S. at 771-772. 7/

This distinction was driven home

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7. Justice Rehnquist was less successful in Salfi in distinguishing Vlandis v. Kline, supra: "Unlike the statutory scheme in Vlandis . . . the Social Security Act does not purport to speak in terms of the bona fides of the parties to a marriage, but then make plainly relevant evidence of such bona fides inadmissible." 422 U.S. at 772. However, since the operative definitions of "residency" in Salfi and Vlandis are precisely parallel, as Justice Brennan notes in dissent, 422 U.S. at 803, the distinction is hardly tenable. If on the other hand Justice Rehnquist was asserting that the Social Security Act did not involve a conclusive presumption because the statute did not by its own terms make "bona fide marriage" the ultimate fact, nevertheless prior cases, such as LaFleur, make clear that the existence or non-existence of a conclusive presumption is to be determined not merely by the terms of the statute, but by reference to its legislative objective. Harvard Note, supra n. 6, at 1551; Chase, supra n. 6, at 689-690.

by Turner v. Department of Employment Security of Utah, 423 U.S. 44 (1975), a per curiam opinion handed down only five months after Salfi. The Turner Court invalidated Utah's conclusive presumption, for purposes of finding ineligibility for unemployment benefits, that all pregnant women are unable to work for a specified period surrounding the expected birth. Stressed the Court, analogizing to LaFleur:

> "The Fourteenth Amendment requires that unemployment compensation boards no less than school boards must achieve legitimate state ends through more individualized means when basic human liberties are at stake." 423 U.S. at 46; emphasis added.

From this development, certain due process principles as to the conclusive presumption doctrine in this Court may be distilled. First, such a presumption may be impermissible when the private

interest involved is a basic human liberty. Stanley v. Illinois, supra, 405 U.S. at 650-651; Cleveland Board of Education v. Lafleur, supra, 414 U.S. at 648; U.S. Dept. of Agriculture v. Murry, supra, 413 U.S. at 518 (Marshall, J., concurring); Turner v. Dept. of Employment Security of Utah, supra, 423 U.S. at 46. Second, such a presumption may be invalid when its purported underlying purpose appears to be defeated through arbitrary application. Bell v. Burson, supra, 402 U.S. at 541; Vlandis v. Kline, supra, 412 U.S. at 452; cf. Weinberger v. Salfi, supra, 422 U.S. at 772 (maj. opn.), 803 (Brennan, J., dissenting). Finally, to summarize, a conclusive presumption requires courts to weigh carefully the private and governmental interests involved, the risk of erroneous deprivations of the

private interest, and the acceptability of the greater adminstrative burden created by individualized determinations. LaFleur, supra, 414 U.S. at 648; Murry, supra, 414 U.S. at 518-519 (Marshall, J., concurring); Turner, supra, 423 U.S. at 46; Salfi, supra, 422 U.S. at 771-772. This test as to the need for individualized determinations of ultimate factual issues merely involves an application of the overarching due process analysis of Mathews v. Eldridge, 424 U.S. 319 (1976), which governs any statutory attempt to infringe on an interest protected by due process. As was said in Mathews, the factors to be balanced are:

> "[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of

additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Id. at 335. 8/

2. Due Process Analysis of the Conclusive Presumption In the Case at Bench

Thus far we have shown that the Nebraska 1978 bail provision does indeed

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8. As some commentators have suggested, the use of such an analysis to determine the validity of conclusive presumptions is really a "new" procedural due process; there is no attempt to say that the legislature's statutory purpose is irrational, and we are not suggesting a return to outmoded substantive due process, Lochner style. See Ackerman, supra n. 6, at 779-798, 808-811; Chase, supra n. 6, at 665-670, 685-705; Tribe, American Constitutional Law, § 16-32, at 1095-1096 (1st ed. 1978); Tribe, supra n. 6, at 284-289 (1975). This restrictive use of conclusive presumption analysis -- i.e., only when vital human interests are at stake -- will derail the "virtual engine of destruction" of legislative classifications that Justice Rehnquist, writing for the Salfi Court, felt the doctrine was in danger of becoming, 422 U.S. at 772.

create a conclusive presumption of the unacceptable dangerousness of accused forcible sex offenders, and we have argued that conclusive presumption analysis as it has developed from Bell through Salfi and Turner is an entirely worthy doctrine in a case of this nature. We now proceed to a discussion of the constitutionality of the particular conclusive presumption before the Court, considering the significance of the detainee's interests, the state's interest in being able "to presume rather than prove," and the risk of erroneous deprivation of the detainee's interest by the procedure currently employed. See Mathews v. Eldridge, supra, 424 U.S. at 335. We submit that in the pretrial phase of a criminal case, where a vital human interest affecting liberty is at stake and there

has been as yet no legal adjudication of guilt, the Fourteenth Amendment's Due Process Clause requries individualized hearings to protect that interest adequately.[9/]

Employing the three-fold test of Mathews v. Eldridge, supra, 424 at U.S. at 335, it is evident, first, that the pretrial detainee's interest in liberty is indeed vitally important, assuming arguendo that it does not attain the

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9. This suggested due process principle thus would not by its terms apply to statutory conclusive presumptions following conviction, such as mandatory minimum prison sentences, mandatory denials of probation, or habitual offender statutes. Such mandatory post-conviction statutes generally raise questions of a different sort, such as Eighth Amendment issues of cruel and unusual punishment. Compare Rummel v. Estelle, 445 U.S. 263, 284-285 (1980) (recidivist offender statute, raising issue of cruel and unusual punishment) with Bell v. Wolfish, supra, 441 U.S. at 535 (pretrial conditions of confinement raising issue of due process).

status of a constitutionally guaranteed "fundamental right." "Liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part). As this Court has said, "Bail . . . is basic to our system of law," Schilb v. Kuebel, 404 U.S. 357, 365 (1971), and,

> "[t]his traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. To infer from the fact of indictment alone a need for bail in

an unusually high amount is an arbitrary act." Stack v. Boyle, 342 U.S. 1, 4-6 (1951) (dictum).

Moreover, the interest in liberty is all the more significant for an accused person, because once he is legally detained, constitutional protection as to his conditions of confinement is diminished. At that point, the due process guarantee for an accused prevents only conditions of confinement that amount to "punishment," a term this Court now defines by reference to the government's purpose, not the impact on the accused. Bell v. Wolfish, supra, 441 U.S. at 538. Therefore, assuming arguendo the legality of the initial decision to detain, the accused may be imprisoned for month after month before coming to trial, traditionally in a detention facility or local jail, which

most authorities agree may be the worst of all penal environments, inferior to prison itself. See President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Corrections 24 (1967); Thaler, Punishing the Innocent: The Need For Due Process and the Presumption of Innocence Prior to Trial, 1978 Wis.L. Rev. 441, 452, and other authorities cited therein.

Beyond the gross impact of the incarceration itself, the pretrial detainee suffers other sorts of "grievous loss," cf. Morrissey v. Brewer, 408 U.S. 471, 4821 (1972). He is likely to lose his job if he has one, be deprived of income, and be injured in his relationships with his family. See Gerstein v. Pugh, 420 U.S. 103, 114 (1975); United States v. Marion, 404

U.S. 307, 320 (1971); Thaler, supra, at 452; Comment, Incarcerating the Innocent: Pretrial Detention in Our Nation's Jails, 21 Buffalo L.Rev. 891, 901 (1972). He suffers the stigma that attaches from the mere fact of detention. Thaler, supra, at 452-454. But perhaps the most significant effects of pretrial detention for an accused relate to his ability to prepare for the upcoming trial, his access to counsel, and the final results. A detainee's ability to prepare an adequate defense is greatly impaired, and consultation with an attorney and general access to counsel becomes much more difficult. See Stack v. Boyle, supra, 342 U.S. at 8; Smith v. Hooey, 393 U.S. 374, 379-380 (1969); Van Atta v. Scott, 27 Cal.3d 424, 435 nn. 9, 10, 166 Cal.Rptr.149 (1980), and authorities cited.

Finally, several statistical studies share the conclusion that the defendant at liberty pending trial stands a better chance of not being convicted or, if convicted, of not receiving a prison sentence. Ares, Rankin & Sturz, The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole, 38 N.Y.U.L.Rev. 67, 86 (1963) [hereinafter Ares Study]; Rankin, The Effect of Pre-Trial Detention, 39 N.Y.U.L.Rev. 641, 642 (1964) [hereinafter Rankin Study]; Study, Preventive Detention: An Empirical Analysis, 6 Harv.Civ.Rts. -- Civ.Lib.L.Rev. 289, 347 (1971) [hereinafter Harvard Study]; The Unconstitutional Administration of Bail: Bellamy v. The Judges of New York City, 8 Crim.L. Bull. 459, 468 (1972) [hereinafter Bellamy Study]; see generally Thaler, supra, at 455-459.

For example, Rankin's study, supra, found that only one factor -- status as a detainee -- not considerations such as previous record, amount of bail, quality of counsel, or stable employment, was tied disproportionately to an unfavorable outcome. 39 N.Y.U.L. Rev. at 652-655. One commentator has concluded that this disparity in conviction rates resulting from pretrial detention as such is due most of all to the widespread use of plea bargaining, in which the incarcerated defendant is willing to plead guilty in return for a sentence of "credit for time served". Thaler, supra, at 455-459.

In sum, the accused has a vitally important liberty interest in not being arbitrarily labeled as dangerous and thus not bailable as a matter of law. At the very least, this pretrial

interest in liberty, while conditioned on reasonable bail under the Eighth Amendment, is worthy of zealous protection by the courts, and thus is entitled to at least an "intermediate" level of review. Cf. Turner v. Department of Employment Security of Utah, 423 U.S. at 46; Hampton v. Mow Sun Wong, 426 U.S. 88, 102-103 (1976) (aliens deprived of federal civil service employment; intermediate standard of review employed to assess issue of due process violation); United States Department of Agriculture v. Murry, supra, 413 U.S. at 518-519 (Marshall, J., concurring); see generally Tribe, American Constitutional Law, supra, § 16-31, at pp. 1089-1092.

With respect to the strength of the governmental interest involved -- the protection of society from recidivist rapists and other forcible sex offenders

-- there can be no question that this interest is substantial and totally legitimate.[10/] As this Court stated in Coker v. Georgia, 433 U.S. 584, 597 (1977), and as the Court of Appeals below concluded, Hunt v. Roth, supra, 648 F.2d at 1162, forcible rape is a highly reprehensible and serious crime. There is no question that society should be able to protect itself from rapists and like offenders, considering the end in itself.

The basic due process issue here concerns neither the strength of the detainee's interest in liberty nor

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10. By this we mean the protection of society from recidivism by persons already convicted of such offenses. We are not referring at this juncture to the ultimate question of whether the dangerousness of an accused may ever be considered as a factor in the bail decision, an issue this Court need not decide in this case. See also n. 11, supra.

Nebraska's desire to prevent future forcible rapes and similar crimes, for both interests are highly important. Rather, the issue is the particular procedure employed by Nebraska to accomplish its objective. In light of the accused's vital interest in his freedom, which requires a close, if not strict, scrutiny by this Court of a law infringing upon it (Turner, supra; cf. Mow Sun Wong and Salfi, supra), must Nebraska's legitimate end of societal protection be achieved through more individualized means? Under the test of Mathews v. Eldridge, supra, we submit that the key questions are first, whether Nebraska's wholesale denial of bail to accused forcible sex offenders, where the proof is evident or the presumption great, creates an unacceptable risk of erroneous deprivation of the

detainee's liberty, and second, whether an individualized hearing procedure that did not presume the ultimate fact at issue -- the purported dangerousness of the accused -- would be administratively feasible. Mathews v. Eldridge, supra, 424 U.S. at 335; U.S. Department of Agriculture v. Murry, supra, 413 U.S. at 518 (Marshall, J., concurring).

To assess properly the risk of erroneous deprivations of liberty posed by the Nebraska 1978 bail amendment, it must be recognized that there are three related riddles of prediction involved in this conclusive presumption of the dangerousness of accused rapists and like offenders if released before trial. Each riddle is fraught with difficulty.

First, predictions of dangerousness or future violence on the part of an individual are generally unreliable as

an empirical matter, even when studying already convicted offenders, whether by resort to comparisons of recidivism rates, psychiatric "expertise", or other factors.[11/]

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11. As already discussed, see discussion at n. 10, supra, and as the Eighth Circuit has pointed out, Hunt v. Roth, supra, 648 F.2d at 1164, we do not reach, and this Court need not reach, the difficult question of whether the dangerousness of the individual defendant, if capable of determination, can ever be considered as a factor in a pretrial release decision by a judge who is exercising independent discretion. The courts have divided over this issue. Compare United States v. Wind, 527 F.2d 672 (6th Cir. 1975), and United States ex rel. Covington v. Coparo, 297 F.supp. 203, 207 (S.D.N.Y. 1969), with United States v. Beaman, 631 F.2d 85, 87 (6th Cir. 1980), and In re Underwood, 9 Cal.3d 345, 348-349, 107 Cal.Rptr. 401 (1973) (based on Cal. Const., Art. 1, § 6). Since in this case the Nebraska constitutional provision precludes any exercise of discretion on the dangerousness issue with respect to forcible sex offenders, but rather mandates that dangerousness be presumed for such defendants, we consider here the general issue of predicting dangerousness solely with respect to the reasonableness of the "fit" between means and

The conclusion of one study is that predictions of dangerousness by psychiatrists in civil commitment proceedings are 65% to 85% wrong. See Ennis & Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Cal.L.Rev. 693, 713 (1974). Another study of over 4,000 California Youth Authority wards could not identify any "operationally practical" means to predict assaultive potential. See Wenk, Robison & Smith, Can Violence Be Predicted, 18 Crime & Delinquency 393 (1972). A Harvard study found no correlation between the type of crime for which a person was first

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11. (Fn. Cont.)

ends that is involved in Nebraska's conclusive presumption. See e.g., Harvard Note, supra n. 6, at 1551-1556; The Supreme Court, 1974 Term, 89 Harv.L.Rev. 83-84 (1975).

arrested and the severity of the second offense if there was one. Harvard Study, supra, 6 Harv. Civ. Rights -- Civ. Lib. L.Rev. at 342.

A second difficulty inherent in Nebraska's conclusive presumption is the prediction of dangerousness as an empirical matter for those who have only been accused, and not yet convicted of crimes. If such predictions are based on anything, then presumably they rest on the two-part notion that, at least in certain identifiable cases, the accusation is true (i.e., the defendant committed the crime in question), and second, the commission of the crime for which charges are pending means that the person will commit another similar crime if given the opportunity. This two-step premise often founders, however, at the first step. The well-known Bellamy

study of the effect of pretrial detention on conviction rates in New York City showed that 20% of the defendants who remained confined over the period of the study received a dismissal (compared to a 50% dismissal rate for those who were released before trial). Bellamy Study, supra, 8 Crim.L.Bull. at 468. Thus, for at least the 20% who received dismissals the presumption of recidivism by detainees breaks down, to the extent that it is based on the fact of conviction. As to the second step, while statistics as to the amount of recidivist crime on bail remain elusive, one commentator has summarized the results of certain studies during the 1960's as follows:

> "Thus, while certainty is unattainable, present indications are that the total number of felony defendants indicted for other felonies

> allegedly committed on pretrial release is less than 10% of all accused felons on pretrial release. Furthermore, the number of defendants charged with and convicted of violent crimes on bail, whatever the nature of the original felony charge, is probably only about 3 to 5%." Hickey, Preventive Detention and the Crime of Being Dangerous, 58 Geo.L.Rev. 287, 302 (1969) [hereinafter Hickey].

Also, even assuming arguendo that preventive detention, if properly imposed at all, should be limited only to those situations where there is a significant likelihood of the commission of a serious crime while on bail, it is extremely difficult to predicate the commission of serious crime on bail upon the seriousness of the pending charged offense. No study of crime on bail, to counsel's knowledge, has yet demonstrated any significant correlation between the seriousness of the crime

charged and the seriousness of the crime, if any, committed on bail. See Hickey, supra, at 304-308. Professor Dershowitz has summarized well the intractability of the problems posed in predicting violent crime on bail:

> "Predictions of human conduct are difficult to make, for man is a complex entity and the world he inhabits is full of unexpected occurrences. Predictions of rare human events are even more difficult. And predictions of rare events occurring within a short span of time are the most difficult of all. Acts of violence by persons released while awaiting trial are relatively rare events (though more frequent among certain categories of suspects), and the relevant time span is short. Accordingly, the kind of predictions under consideration begin with heavy odds against their accuracy. A predictor is likely to be able to spot a large number of persons who would actually commit acts of violence only if he is also willing to imprison a very much larger number of defendants who would not, in fact,

> engage in violence if released." Dershowitz, "Preventing 'Preventive Detention'", New York Review of Books, March 13, 1969, at 24-25, quoted at Hickey, supra, at 305 n. 112.

Indeed, perhaps the worst reason for a preventive detention statute, which obviously focuses on the issue of crime on bail, is alarm over a rising crime rate in general, which may bear very little correlation to the crime rate on bail. See Hickey, supra, at 303.

The third predictive riddle involved in the Nebraska scheme relates to the "singling out" of accused forcible sex offenders, as opposed to others accused of violent non-capital crimes, for special "wholesale" treatment. That is to say, even if this Court finds a sufficient basis of accuracy for the first two levels of prediction, there is the further issue inherent in this

conclusive presumption: i.e., the labeling of accused forcible sex offenders as being more dangerous if released before trial than others accused of non-capital violent felonies. Again, the Harvard Study, referred to supra, showed no correlation between the type of crime of the first offense and the severity of the second offense, if there was one. 6 Harv.Civ.Rts. -- Civ.Lib.L.Rev. at 342. Also, the Harvard study attempted to correlate 26 different variables to the commission of crime on bail, but the conclusion was that none of them evidenced a significant correlation. The correlation coefficients if the defendant had committed dangerous crimes in the past ten years, or had used violence in the initial crime for which charges were pending, or had used a weapon in the initial crime for which charges were

pending, were .219, .062, and .054, respectively. Harvard Study, supra, at 392.

Moreover, Nebraska's interest in protecting society through the means it has employed herein can only be justified, even conceivably, if this particular class of accused forcible sex offenders is more likely to commit further violent crime on bail than all other classes of defendants accused of non-capital violent crimes. However, the only relevant evidence known to this counsel indicates to the contrary. According to a detailed study conducted by the National Bureau of Standards in 1970, analyzing comparative recidivism rates of those released pending trial, persons accused of sexual assault actually have a lower incidence of re-arrest while on bail than those accused

of many other crimes. The study also found that of those persons accused of sexual assault, released on bail, and then subsequently re-arrested, there were no subsequent re-arrests for further sexual assaults or other sex offenses. National Bureau of Standards, Compilation and Use of Criminal Court Data in Relation to the Pre-trial Release of Defendants: Pilot Study (1970), at 135, 168.

In sum, we submit that the risk of erroneous deprivation of pre-trial liberty among the class of defendants at issue in this case is substantially and unacceptably high. That is to say, there is a large potential number of such defendants who would not commit serious crimes, particularly forcible sex offenses, if released before trial. Moreover, the fact that Nebraska's

conclusive presumption against bail applies only "where the proof is evident or the presumption great" does not save it from the above-described predictive difficulties. That criterion merely requires the trial court to find a certain degree of likelihood that the defendant committed the forcible sex offense for which charges are pending. There is no requirement in the provision, however, that the trial court also find, in light of the likelihood of commission of the charged offense, that the defendant will also commit further serious crime if released. Indeed, even if a trial court felt it could make such a determination in individual cases, predictions of future offenses that flow from the likelihood of a recent offense being committed are inherently unreliable as a general proposition. Thus,

under the "proof is evident or presumption great" language, the trial court is neither making a prediction about the future, nor could he do so in any scientific manner. Nebraska's requirement that such proof or presumption be found obviously limits to some extent the number of accused rapists and like offenders who would otherwise be automatically detained, but it is quite irrelevant to the ultimate prediction which Nebraska has mandated in all such cases, and thus it does not cure the fatal defect of gross over-inclusiveness.

By contrast, there are only slight administrative burdens posed by requiring Nebraska to prove, rather than to presume, the dangerousness of the accused to society if he were to be released on bail. Obviously, under the present Nebraska scheme the trial court

must hold a bail hearing in any event, so as to determine whether the "proof is evident or the presumption great" as to the charged offense. The elimination of the conclusive presumption of dangerousness will simply require the prosecution to show, and the court to find, that the defendant as an individual is sufficiently dangerous, in terms of future potential offenses, to be ineligible for release pending trial.[12/]

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12. Clearly there are additional questions posed if the conclusive presumption is eliminated. We are not suggesting, instead of the present irrebuttable presumption, that there be a "rebuttable" presumption of dangerousness, which the forcible sex defendant would have to overcome through some form of showing. Rather, since it is the state that has the interest of protecting society, that desires to have the accused detained to serve that interest, and that has best access to the damaging evidence drawn from the investigation of the offense which proportedly shows dangerousness, the state should retain the burden of proof on that issue. As to the standard of

Furthermore, the additional burden generated by this widening of the scope of Nebraska's present pretrial bail

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12. (Fn. Cont.)

proof, we submit that the prosecution should be required, at the very least, to show the "dangerousness" of the accused by clear and convincing evidence. See United States v. Edwards, 430 A.2d 1321, 1358-1360 (D.C.App. 1981) (Ferren, J., concurring in part and dissenting in part) (concerning burden of proof issue in District of Columbia pretrial detention law); cf. Addington v. Texas, 441 U.S. 418, 425-433 (1979) (clear and convincing evidence standard is sufficient for imposing involuntary civil commitment, to protect the community from dangerous tendencies of some who are mentally ill). If as we suggest this Court strikes down Nebraska's conclusive presumption, but does not reach the final question of whether dangerousness may ever be considered as a factor for denying bail, then, of course, Nebraska will have a further opportunity to pass statutes providing for the burden of proof, notice, confrontation, and the like. See generally United States v. Edwards, supra, 430 App.2nd 1321 (interpreting District of Columbia pretrial detention statute). Therefore, consideration of these questions now is not necessary to the resolution of the case at bench.

hearing is a tolerable one. While an evidentiary hearing will be required, instances of past or present conduct on which the state proposes to rely to show dangerousness should not be difficult to ascertain, since the state has full access to arrest and conviction records, etc. In addition, Nebraska has a countervailing interest, although Nebraska itself might not agree, in also ensuring the basic fairness of adjudication and the accuracy of findings on such an important issue as dangerousness -- "in short, an interest in not imprisoning anyone unnecessarily. [citations omitted.]" U.S. v. Edwards, supra, 430 App.2d at 1356 (Ferren, J., concurring in part and dissenting in part).

We submit that, in light of the pretrial detainee's vital interest in liberty which is being infringed, and

the requirement of heightened scrutiny by this Court which flows from that fact, the application of the doctrine is entirely appropriate in this case. The use of the conclusive presumption doctrine as a tool to review only those statutes infringing on vital human interests may have appeal to this Court, as compared to the traditionally rigid, two-tiered "strict scrutiny" and "rational basis standards" for equal protection review. It is evident that conclusive presumption analysis, at least in instances like the case at bench, or Stanley, or LaFleur, has equal protection components. After all, a particular group -- pretrial detaineees accused of forcible sex offenses, or unwed fathers, or pregnant schoolteachers -- are being singled out for arbitrary treatment, in comparison to persons

similarly situated, in situations where arguably "fundamental" rights are implicated. According to traditional equal protection doctrine, a classification that has a disparate impact on fundamental rights (either those expressly or impliedly guaranteed by the those expressly or impliedly guaranteed by the Constitution)[13] must be subjected to strict scrutiny, with the very likely consequence of outright substantive invalidation.[14] However, just as equal protection analysis has become more flexible in recent years, providing for an "intermediate" standard of review in

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13. See San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1,38 (1973).

14. See, e.g., Gunther, The Supreme Court 1971 Term --Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For A Newer Equal Protection, 86 Harv.L.Rev. 1, 8.

cases of sex discrimination, for example,[15] this case, like Stanley and LaFleur, provides the Court with an opportunity to employ an intermediate standard for purposes of due process.

Let us assume arguendo that a pretrial detainee's interest in liberty (which in the American criminal justice system traditionally means his opportunity for bail) is vital enough to invalidate a conclusive presumption against it, but is not so fundamental in the constitutional scheme so as to trigger a "strict scrutiny/compelling state interest" test. All that signifies is that the state must allow the detainee a hearing where he has the chance to point to all pertinent factors

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15. E.g., Reed v. Reed, 404 U.S. 71, 76 (1971); Craig v. Boren, 429 U.S. 190, 204 (1976).

demonstrating that he as an individual is an acceptable bail risk. As Professor Tribe puts it, the true import of Weinberger v. Salfi, supra, is:

> ". . .that the invalidation of irrebuttable presumptions [is] but one of several techniques included in intermediate scrutiny, and that the techniques, far from representing a death-knell for the legislative use of per se rules, simply requires legislatures to proceed on a less wholesale basis if possible when certain sensitive matters are at stake. If it is understood that this approach is taken only when the Court might otherwise have invalidated the legislation more sweepingly, it emerges not as a threat to legislative flexibility but as a restrained form of intervention compared with the more conventional form of total invalidation. [fn. omitted.]"

Tribe, American Constitutional Law, supra, §§ 16-30, pp. 1088-1089; emphasis added. See also Ackerman, supra n. 6, at 773-776; Chase, supra n. 6 at 680-684. However, we enter a basic caveat:

as amicus curiae we offer conclusive presumption analysis as an alternative argument. If this Court were to hold, as counsel for appellee is arguing, that appellee Hunt and others similarly situated have a fundamental constitutional right to bail, and under the strict scrutiny standard thus triggered the state lacks a compelling state interest (i.e., anticipated dangerousness of sex offenders per se will never suffice), then there has been a denial of equal protection of the laws requiring an outright invalidation of the state's proferred purpose, as well as the particular Nebraska provision at issue. That is to say, under such a holding consideration of the potential dangerousness of only accused forcible sex offenders, as opposed to defendants accused of other non-capital violent

crimes, would never be a valid state objective, whether accomplished through individual determinations or not. But if this Court is not willing to go that far, and finds that the detainee's interest in liberty on bail is important, but not constitutionally guaranteed, then the due process issue of the conclusive presumption herein become not only pertinent, but an issue that the Court must decide.

Having in mind the nature and extent of that liberty interest, the inherent weaknesses underlying the general predictive assumptions of the Nebraska provision, and the rather enormous risk of erroneous deprivations of the detainee's liberty, this conclusive presumption must fall. As in Vlandis v. Kline, supra, 412 U.S. at 452, if Nebraska purports to be truly concerned

with future dangerousness, the Fourteenth Amendment's Due Process Clause requires Nebraska to allow the individual accused forcible sex offender, like those accused of other non-capital violent crimes, to show that he is indeed not a dangerous risk to the community if released before trial. Assuming arguendo that the protection of society may be a legitimate reason to deny bail, individualized hearings are required, as in Stanley v. Illinois, supra, 405 U.S. at 654-658, Cleveland Board of Education v. LaFleur 414 U.S. at 647-648, and Turner v. Department of Employment Security of Utah, supra, 423 U.S. at 46, since the additional administrative burden does not compare in significance to the basic human liberites at stake (see Escandar v. Ferguson, 441 F.Supp. 53, 59-60 (S.D.Fla. 1977). In

this context, the essential arbitrariness of the Nebraska provision violates due process.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

DATED: December 18, 1981

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES M. MURPHY, District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska,
Appellant,

vs.

EUGENE L. HUNT,

Appellee.

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF LAWS AT WORK (L.A.W.), JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE (IACP), THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION (NDAA), THE STATE OF CALIFORNIA AND THE STATE OF DELAWARE, AS AMICI CURIAE IN SUPPORT OF THE APPELLANT

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This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Hon. Paul L. Douglas, Attorney General of the State of Nebraska, Counsel for Appellant, and Bennett G. Hornstein, Esq., Counsel for Appellee. Letters of Consent of both parties have been filed with the Clerk of this Court. States are not required to obtain consent to file as *Amici Curiea.*

INTEREST OF AMICI

The parties to this brief share a common interest in the case at bar. Laws At Work is a citizens non-profit corporation dedicated to reforming the criminal justice system to one that represents the best interests of law enforcement, law-abiding citizens and victims of crimes. Laws At Work was founded as Citizens for Law Enforcement Needs for this specific purpose by the late Don Belding, Doris Dolan, and Dr. C. Erwin Piper.

For more than 15 years, Laws At Work has been under the direction of Doris Dolan in its efforts to change those laws and

procedures which have placed the rights of the law breaker over those of the law-abider. This organization is active in legislative and judicial reform to assure the public greater safety from those who have chosen to prey upon the law-abiding. Its members are active participants in state and national criminal justice and law enforcement activities, public and private. In addition, its members have been active in speaking before state and national legislative committees and fact-finding commissions, such as the Attorney General's Task Force on Violent Crimes, seeking to provide the vital input of the citizen's point-of-view on the crime problem in our society.

As a non-profit citizens corporation, it has taken seriously the charge given to it by then Governor Ronald Reagan, in 1973, when he served as the honorary Chairman of the California Conference on the Judiciary sponsored by L.A.W., saying:

> "Last year you established an important precedent by being the first to pursue court reform on an organized basis pursuant to a challenge by the Chief Justice of the United States, Warren Burger. And it was an impressive precedent! Your report and recommendations have received widespread national publicity and acclaim . . .
>
> "Part of its greatness comes from the fact that this conference was initiated by interested citizens not involved in the judicial system . . . Volunteer citizens intermeshed with government can produce something of which we can all be proud.
>
> "Now, the question is, 'How do we implement these recommendations?' "

The National District Attorneys Association is the sole national organization representing state and local prosecuting attorneys in America. Its programs of education, training, publications and *amicus curiae* activity in the courts, carries out its guiding purpose since its founding in 1950, of reforming the criminal justice system for the benefit of all our citizens, in particular the law-abiding and those who are the innocent victims of crime.

The International Association of Chiefs of Police is the largest professional association of police executives, police legal advisors and rank and file police officers in the world, consisting of more than 12,600 members in 62 nations. Among its concerns are the rights of innocent victims of crime, including those victimized by violent sex offenders. It seeks restoration of a balance in our criminal justice system that will adequately protect the interests of our law-abiding citizens from those who choose a criminal way of life. Further, the IACP strives to improve the quality and efficiency of law enforcement through improved management techniques and training. These goals are difficult to achieve when countless hours are expended in arresting those individuals that have committed other crimes while released on bail or have failed to appear in court.

The Attorneys General of the States of California and Delaware are the chief law enforcement officers of their states with oversight for the fair and effective enforcement of the criminal laws therein.

Amici will address in this brief the legal issues raised in connection with Article I, Section 9 of the Constitution of the State of Nebraska and the policy issues that require legislative and state constitutional action to protect those victimized by violent sex offenders.

We do not forget, however, that our Society is daily victimized by many other categories of offenders, such as narcotics distributors and sellers, whose violence against the total fabric of our social institutions, as well as violence to the lives and well-being of our individual citizens and their families, is rampant. We believe that the time is at hand for a total examination of our state and federal bail structure and procedures, with the emphasis on judicial discretion exercised for the protection of *all* victims of crimes. We desire a balance to be struck that will put bail in its proper perspective of protecting society from the violence—direct and indirect—of all those who choose careers in crime.

FACTUAL AND PROCEDURAL SETTING OF THIS CASE

In November of 1978, Article I, Section 9 of the Constitution of the State of Nebraska was amended to provide:

> All persons shall be bailable by sufficient sureties, except for treason, *sexual offenses involving penetration by force or against the will of the victim,* and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Nebraska Constitution, Article I, Section 9 (Language added by Amendment emphasized).

Subsequent to the constitutional amendment set out above, the appellee was charged in the District Court of Douglas County, Nebraska, with multiple counts of forcible first degree sexual assault. For purposes of bail consideration only, the appellee stipulated that the proof was evident and the presumption was great and the Douglas County District Court, the Honorable James M. Murphy, appellant herein, denied bail.

Thereafter, the appellee sought habeas corpus relief in the United States District Court for the District of Nebraska and filed a civil rights action against Judge Murphy seeking certain declaratory relief. The United States District Court for the District of Nebraska, denied all requested relief and this appeal followed.

The decision in the combined cases of *Hunt* v. *Roth* and *Hunt* v. *Murphy* was filed by the United States Court of Appeals for the Eighth Circuit on May 13, 1981, and is reported at 648 F. 2d 1148.

ARGUMENT

I.

A STATE CONSTITUTIONAL AMENDMENT WHICH DENIES BAIL TO PERSONS CHARGED WITH, INTER ALIA, SEXUAL OFFENSES INVOLVING PENETRATION BY FORCE OR AGAINST THE WILL OF THE VICTIM WHERE PROOF IS EVIDENT OR THE PRESUMPTION GREAT DOES NOT VIOLATE THE UNITED STATES CONSTITUTION.

Amici will not reiterate at any length the legal arguments made by the appellant in this case, although we are in complete accord with such arguments and wish to associate ourselves with and express our complete support for them. We believe these arguments to be compelling and will supplement the most pertinent legal issues briefly before focusing upon the important policy issues presented by this case. Primarily, *amici* will address these policy questions and their importance to the effectiveness of law enforcement efforts and the societal impact involved.

A.

The 1978 Amendment of Article I, Section 9, of The Constitution of Nebraska Does Not Violate the Eighth Amendment to the United States Constitution.

By the terms of its language, its historical development and subsequent judicial determinations, the Eighth Amendment to the United States Constitution does not create a right to bail, be it absolute or qualified. This Amendment provides only that "excessive bail shall not be required." The Amendment is not addressed to the states, nor has it been incorporated and made applicable to the states through the due process clause of the Fourteenth Amendment.

The language of the Eighth Amendment s clear on its face. It simply does not provide a right to bail. The federal government does not now, nor has it in the past, treated bail as a right for all offenses. The Judiciary Act of 1789, passed by Congress shortly before the Eighth Amendment was adopted, provided for bail only in non-capital criminal cases, with the right to bail in capital offenses vested in the discretion of trial judges. It must be noted that in 1789, this Act served to deny bail on a broad basis, since all felonies then were capital offenses. *Forcible Rape and the Right to Bail,* 17 San Diego L. Rev. 1061, 1080 n. 98 (1980).

Currently, various federal statutes and rules deny bail in specific categories of offenses. These include the Federal Rules of Criminal Procedure § 46(a)(1), (a)(2) and the Bail Reform Act of 1966 (18 U. S. C. §§ 3141-3152), where judicial discretion may be exercised to deny bail in capital cases. The Internal Security Act of 1950 gives the Attorney General discretion to detain or release defendants. See *Preventive Detention,* 36 Geo. Wash. L. Rev. 178 (1967). While these provisions permit denial of bail to secure the defendant's appearance at trial, 18 U. S. C. §§ 4244-4248 (1964) authorizes the federal courts to deny bail to the mentally incompetent, which may be considered additional protection for society. This concept is explored in some detail below.

The various constitutions of the states provide a wide array of exceptions to, and limitations upon, any asserted fundamental right to bail. Only nine states have a counterpart to the Eighth Amendment prohibiting excessive bail. Thirty-one states deny bail in capital offenses in certain circumstances. Two states deny bail for murder or treason. Michigan denies bail, *inter alia,* when a defendant is awaiting the disposition of a prior violent felony charge, and for those defendants who are on probation or parole as a result of a prior conviction for a violent felony. Utah has a similar provision, but also includes a denial of bail to defendants free on bail awaiting trial on a previous felony charge. *Forcible Rape and The Right to Bail,* 17 San Diego L. Rev. 1061, 1066-67, n. 29 (1980).

B.

The 1978 Amendment of Article I, Section 9, of the Constitution of Nebraska Does Not Violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

In the absence of a finding that there is a fundamental right to bail, or that a suspect class is involved, a rational basis test is applicable for the determination of a violation of the Equal Protection Clause. Rights which have been deemed to be fundamental include the right to travel, *Shapiro* v. *Thompson,* 394 U. S. 618 (1969); the right to vote, *Harper* v. *Virginia Bd. of Education,* 383 U. S. 663 (1966); the right to privacy, *Griswold* v. *Connecticut,* 381 U. S. 479 (1965); the right to equal access to appellate review, *Griffin* v. *Illinois,* 351 U. S. 12 (1956); the right to marry and procreate, *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942); and all first amendment rights. Suspect classes include alienage, *Graham* v. *Richardson,* 403 U. S. 365 (1971); race, *Loving* v. *Virginia,* 388 U. S. 1 (1967); and national origin, *Korematsu* v. *United States,* 323 U. S. 214 (1944).

The right to bail is not a fundamental right, as must be apparent from the federal and state laws which have denied bail since the founding of our country. Furthermore, it cannot reasonably be contended that rapists are a constitutionally suspect class. The act is a willful one and does not portend a status such as race, alienage or national origin. The question before this court then becomes whether the Nebraska constitutional amendment is founded on a rational basis. The purpose of this bail provision is twofold: to assure the appearance of defendants at trial *and* to protect the safety of the law-abiding populace. Any question of whether these goals have a legitimate state purpose is ludicrous in its statement. An analysis of statistical data that overwhelmingly supports this rational basis is presented in Point II, *infra.*

At this juncture, however, *amici* would pose the question to the court of what benefit the Equal Protection Clause bestows upon law-abiding citizens. Do we not have a fundamental right to be free from violent crimes? Do we not have the fundamental right to pursue the prosecution of those who would commit the most reprehensible of sexual crimes, without the fear and intimidation inherent in the knowledge that the offender is free on bail? Are the citizens of our states not free to mandate by overwhelming popular vote that those who are charged with sexual offenses, where the proof is evident or the presumption great, be isolated and prevented from repeating their attacks on innocent victims?

Amici would ask this court to consider the rights of the law-abiding in resolving the constitutional issues, not simply the individual rights of those arrested for violent sex crimes where the proof is evident or the presumption great. Indeed, this latter provision in the Nebraska Constitution is sufficient procedural protection for any person arrested for such an offense, making it highly unlikely that an innocent defendant would be denied bail in such a case.

II.

AS A MATTER OF PUBLIC POLICY, THE PEOPLE OF A STATE MUST BE ABLE TO TAKE RESPONSIBLE AND CONSTITUTIONAL MEASURES TO SECURE THEIR SAFETY AND WELL-BEING.

A.

Pretrial Release Must Be Viewed As a Two-fold Function: That of Assuring a Defendant's Appearance At Trial and That of Protecting Our Citizens.

While bail has never been perceived as an absolute right in our American system of justice, so, too, must it not be perceived as a single function mechanism in this framework. Some have

viewed the primary function of bail as a method of assuring that a defendant will appear at his trial. There is a significant danger, however, in accepting this as the sole purpose and function of bail. Pretrial release, by its very nature and practical application, can and must also be a method of protecting the public.

On February 8, 1981, in his Annual Report on the Judiciary to the American Bar Association, the Chief Justice of this Court directly addressed this point, when he stated:

> I am not advocating a new idea but merely restating an old one that we have ignored. At this point judicial discretion and judicial restraint require me to stop and simply to repeat that governments were instituted and exist chiefly to protect people. If governments fail in this basic duty they are not excused or redeemed by showing that they have established the most perfect systems to protect the claims of defendants in criminal cases. *A government that fails to protect both the rights of accused persons and also all other people has failed in its mission.* (Emphasis added) 67 American Bar Association Journal 292 (1981).

Without minimizing the need to secure a defendant's presence at trial, *amici* suggest that sole reliance on this function as the basis for bail would foster a situation where the defendant who aggravates his initial charge by merely forgetting or misconstruing his court date would be locked up; while a defendant who repeatedly aggravates his initial charge by going on a crime spree, yet continues to faithfully appear before the court, is free to continue his illegal activities at least until the time of a conviction. We must then pose the question of whether our jails are more suitably used for protecting us from the confused or absent-minded defendant who fails to appear, or those who pose a significant and on-going threat to the safety and security of our citizens through their continuing criminal conduct.

An additional consideration of the misconception that pretrial release is solely for the purpose of assuring the defendant's appearance at trial is the effect such a view has on deterrence of crime. When a dangerous defendant is released on bail, he is not only placed in a position enabling him to commit further crimes, but he is in a position to do so without any significant threat of further sanctions. The Chief Justice took a practical view of this when he stated:

> It is clear that there is a startling amount of crime committed by persons on release awaiting trial, on parole, and on probation release. It is not uncommon for an accused finally to be brought to trial with two, three, or more charges pending. Overburdened prosecutors and courts tend to drop other pending charges when one conviction is obtained. Should we be surprised if the word gets around in the "criminal community" that you can commit two or three crimes for the price of only one and that there is not much risk in committing crimes while awaiting trial? (footnote omitted) 67 American Bar Association 292 (1981).

Our system of criminal justice is founded in large part on the concept of deterrence. The legal mechanisms which subvert that concept greatly undermine any potential for effective law enforcement. Bail provisions which do not consider the government's responsibility of protecting its citizens readily fall into this category. Yet for the most part, the bail provisions of the various states and the federal government have been of the assurance type, rather than deterrence type. Thirty-one states have constitutional provisions granting bail as a matter of right in all criminal offenses except capital offenses under various circumstances. See *Forcible Rape and the Right to Bail,* 17 San Diego L. Rev. 1061, 1066. n. 29 (1980). Even though defendants accused of capital offenses are denied bail under these provisions, they must still be considered assurance-type provisions. In *State* v. *Konigisberg,* 33 N. J. 367, 164 A. 2d 740 (1960), the court illustrated this point by stating, "the underlying motive for denying bail in . . . capital cases is to assure the

accused's presence at trial. In a choice between hazarding his life before a jury and forfeiting his . . . property, the framers of the Constitution obviously reacted to man's undoubted urge to prefer the latter." 164 A. 2d at 743.

Typical of the assurance-type state bail provision is that of California where Cal. Const. Art. I, § 12 states "A person shall be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great."

Similarly, the federal Bail Reform Act of 1966 (18 U. S. C. § § 3141-3152 (1976)) has failed to recognize and give legitimacy to the function of protecting society. Indeed, the congressional declaration of purpose explicitly rejected such an interest when it stated:

> This legislation does not deal with the problem of the preventive detention of the accused because of the possibility that his liberty might endanger the public, either because of the possibility of the commission of further acts of violence by the accused during the pretrial period, or because of the fact that he is at large might result in the intimidation of witnesses or the destruction of evidence. H. R. Rep. No. 1541, 89th Cong., 1st Sess. 1 (1966).

Even though the assurance-type bail provision prevails, it has long been acknowledged that common practice has allowed the setting of high bail for defendants who are believed to be of significant danger to the community, regardless of the likelihood of the defendant's appearing at trial. See U. S. Dept. of Justice, *Proceedings and Interim Report of the National Conference on Bail and Criminal Justice,* (1965); *Footnote to Furman: Failing Justification for the Capital Case Exception to the Right to Bail After Abolition of the Death Penalty,* 10 San Diego L. Rev. 349 (1973); and *Forcible Rape and the Right to Bail,* 17 San Diego L. Rev. 1061, 1068 n. 37 (1980).

Furthermore, the American Bar Association has aptly identified the conflict inherent in a legal framework which formally provides only the assurance-type of bail provision, but

which, in reality, practices deterrence as well. The commentary to the ABA Project on Minimum Standards for Criminal Justice Standards Relating to Pretrial Release (1968) states:

> It is no secret that many judges when faced with a defendant whom they fear will commit "additional crimes" if released, feel compelled to set bail beyond his reach. In effect, bail is used to deny rather than to facilitate pretrial release . . . So-called preventive detention should be dealt with openly and on its own merits, not masked behind manipulation of bail amounts.

It therefore is imperative to acknowledge that pretrial release does have two functions, and that neither is to be subservient to the other. A government's responsibility must be extended to that of protecting its citizens and this must be balanced with the assurance of appearance at trial.

A state constitutional amendment which is based on government's duty to enhance the safety of its law-abiding citizens through tighter bail provisions has seen increased support and endorsements during the past year. The Chief Justice of this Court has placed bail revision among the highest priorities in confronting the problems of crime. He has stated, "A second step [to achieve deterrence] is to re-examine statutes in pretrial release at every level." 67 ABA Journal 292 (1981), and, "Here are a few steps which ought to be considered: (1) Restore to all pretrial release laws the crucial element of dangerousness to the community, based on a combination of the evidence then available and the defendant's past record, to deter crime while on bail; . . ." 67 ABA Journal 293 (1980).

Additionally, *amici* note that the Attorney General's Task Force on Violent Crime-Final Report makes a similar recommendation when it states, "The Attorney General should support or propose legislation to amend the Bail Reform Act that would accomplish the following: (a) Permit Courts to deny bail to persons who are found by clear and convincing evidence to present a danger to particular persons or the community." 29 CrL 3133 (1981).

B.

A State Has a Compelling Interest in Denying Bail to Those Accused of Sexual Offenses Involving Penetration by Force or Against the Will of the Victim, Where Proof is Evident or the Presumption Great.

In 1977, this Court characterized the crime of rape as follows:

> It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the "ultimate violation of self." It is also a violent crime because it normally involves force, or the threat of force, or intimidation, to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage. Because it undermines the community's sense of security, there is public injury as well.

Coker v. *Georgia*, 433 U. S. 584 at 597-98 (1977).

Since the time that the court made this statement in *Coker*, it is likely that there have been more than one quarter of a million forceable rapes in this country. The best law enforcement efforts in the world have not only been unable to impact effectively on this crime, they have been unable to stop or even slow the annual progressive increases in victimization. Table 1 presents the FBI's Uniform Crime Reports statistic of this offense from 1960 to 1979. While criminal justice statistics are often suspect and open to varying interpretations, the frequency and increase of the offense of forcible rape is startling, appalling—and unchallenged. In no year since 1960 has the number of forcible rapes failed to increase. That number has risen so steadily that it almost exactly doubles every 10 years! Furthermore, the frequency rate per 100,000 inhabitants has increased every year since 1963. Charts 1 and 2 graphically illustrate the dimensions of these increases. From 1975 to 1979, the number of forcible rapes increased by a dramatic 31 per cent.

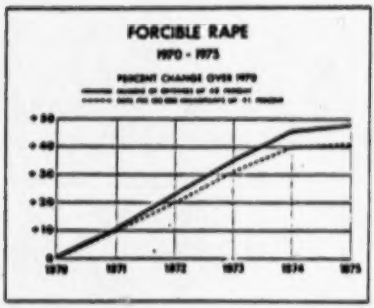
TABLE 1

Index of Forcible Rape in the United States (1960-1979)

Year	Number of Offenses	Rate per 100,000 Inhabitants
1960	17,190	9.6
1961	17,220	9.4
1962	17,550	9.4
1963	17,650	9.4
1964	21,420	11.2
1965	23,410	12.1
1966	25,820	13.2
1967	27,620	14.0
1968	31,670	15.9
1969	37,170	18.5
1970	37,990	18.7
1971	42,260	20.5
1972	46,850	22.5
1973	51,400	24.5
1974	55,400	26.2
1975	56,090	26.3
1976	56,730	26.4
1977	63,020	29.1
1978	67,131	30.8
1979	75,989	34.5

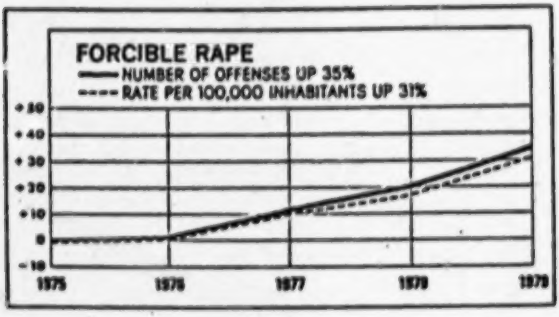
FEDERAL BUREAU OF INVESTIGATION, U. S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 13 (1979).

CHART 1



1975 FBI Uniform Crime Reports, Crime in The United States, U. S. Dept. of Justice (1976).

CHART 2



1979 FBI Uniform Crime Reports, Crime in the United States, U. S. Dept. of Justice (1980).

When this offense is compared to murder and non-negligent manslaughter, we find that forcible rapes are more than three times as prevalent. In 1960, there were 9,110 known offenses of murder and non-negligent manslaughter and 17,190 of forcible rape, a ratio of less than 1 to 2. By 1977, there were 19,120 known offenses of murder and non-negligent manslaughter, compared to 63,020 of forcible rape, showing a ratio of *more* than 1 to 3. Additionally, while in no year did the frequency of forcible rapes decline over that period, there were four years when the number of murders and non-negligent homicides were actually less than the prior year. Sourcebook of Criminal Justice Statistics, 1979, p. 402.

The data discussed above obviously include only those offenses which were reported to the police. It is generally acknowledged that the offense of rape is one of the most under-reported crimes. There are many reasons why victims fail to report this offense. Among the reasons that are most pertinent to the issues in this case are the emotional ordeal of criminal prosecution and the fear of retaliation by the offender. An offender who is free on bail not only has the ability but the incentive to threaten and intimidate the victim, who is generally the sole witness for the prosecution. Victims must have confidence that the criminal justice system will afford a reasonable assurance of protection if they cooperate in the prosecution of alleged offenders. What assurance can they be given when they know that the offender is out of jail only hours after his apprehension?

Victimization studies report widely varying data. The Law Enforcement Assistance Administration (L. E. A. A.) National Crime Survey projected that in 1977, there were 90,136 reported rapes and attempted rapes, while 64,102 such incidents went unreported. Sourcebook p. 328. This would appear to be one of the most conservative figures for this type of study. See, e. g., *Forcible Rape and the Right to Bail,* 17 San Diego L. Rev. 1061 at 1064, n. 15 (1980), where it is pointed out that similar studies indicate the ratio of reported to unreported rapes may be as high as *one to three* or *one to five.*

While the data discussed above provides a disturbing view of the scope of the offense of rape, a key issue in the instant case is that of the dangerousness of accused rape offenders *while awaiting trial.* Recidivism data is often inconsistent. However, several reports indicate quite clearly that individuals who have committed rapes tend to repeat. A follow-up study of paroled inmates indicates that from 1974 through 1976, of those inmates imprisoned for forcible rape who had been paroled and then found to commit a subsequent offense, 26.7 per cent had again committed a forcible rape. The comparable figure for willful homicide is 16.3 per cent. Sourcebook p. 669. This difference cannot be overlooked. It provides a rational basis for legislative and constitutional choices in the area of bail reform, specifically in the category of violent sex offenders.

A number of controlled studies give added credibility to the concept of the dangerousness of rape defendants. A 1977 report from the respected social science study group, the Battelle Memorial Institute, illustrates the prior arrest background of rape suspects as reported from a sampling of police agencies. This data is included as Table 2. Forcible Rape, A National Survey of the Response by Police, Police Volume 1, National Institute of Law Enforcement and Criminal Justice, L. E. A. A., U. S. Dept. of Justice, p. 24 (1977). Similarly, Table 3 illustrates the comparable statistics for those suspects actually prosecuted. Forcible Rape, A National Survey of the Response by Prosecutors, Prosecution Volume 1, National Institute of Law Enforcement and Criminal Justice, L. E. A. A., U. S. Dept. of Justice, p. 17 (1977).

TABLE 2

Offender Arrest Record

Categories	Over 500K	100—500K	County	Under 100K
Offenders with previous arrest records for:				
• rape	17.5%	27.8%	23.4%	21.5%
• other sex offenses	19.5%	30.2%	26.7%	18.8%
• other violent offenses	40.6%	28.6%	34.3%	36.0%

Forcible Rape, A National Survey of the Response by Police, Police Volume 1, National Institute of Law Enforcement and Criminal Justice, L. E. A. A. U. S. Dept. of Justice (1977)

TABLE 3

Accused With Previous Arrest Records

Categories	Mean Percentage by Population of County		
	Large	Medium	Small
Rape	26%	16%	17%
Other Sex Offenses	24%	22%	12%
Other Violent Offenses	38%	25%	22%
Felonies (Non-Violent Crimes)	28%	23%	23%

Forcible Rape, A National Survey of the Response by Prosecutors, Prosecution Volume 1, National Institute of Law Enforcement and Criminal Justice, L. E. A. A. U. S. Dept. of Justice (1977)

A study of the backgrounds of 90 rapists who had been sentenced in California under determinate sentencing laws in 1977 and 1978, showed that 86 per cent had at least one prior felony conviction. Yet remarkably, 76 per cent were imprisoned for the first time. Fifty-three per cent of these men had prior convictions for violent offenses. In 31 per cent of the cases, the records showed at least one prior rape conviction; with an additional 12 per cent having been arrested for rape, but not convicted. *Rape and Sexual Assault,* Ed. by C. G. Warner, Aspen Publication (Maryland, 1980).

The most disturbing data of all comes from the Battelle study mentioned above:

> [T]he rapists interviewed at Atascadero demonstrated a wide range of previous criminal experience. Official records listed a total of 142 rape convictions or arrests among the group; and the subjects admitted to 69 additional rapes for which they had not been apprehended. Arrests for sex offenses other than rape were extremely rare.
>
> Arrests for non-sexual offenses usually were for violent crimes such as roberry [sic] and assault. More than three quarters of the offenders had at least one previous arrest for robbery or assault; five had been arrested for homicide or assault; five had been arrested for homicide and three convicted of rape/homicide. Eighty per cent of these men had one or more adult burglary arrests.
>
> Although this group of offenders is *not* representative of the entire rape offender population, their history of both violent and non-violent criminal offenses is impressive. Even more striking, perhaps, is the repetitiveness of the criminal acts. For example, the number of rape offenses committed by this small group alone approximates the number of rape reports we would expect in a given year in a city of 350,000-400,000 people.

Forcible Rape, Final Project Report, National Institute of Law Enforcement and Criminal Justice, L. E. A. A., Dept. of Justice, p. 11 (1978).

Amici suggest that the data reported here is compelling. The citizens of the states must be heard on the issues which so directly threaten their physical and emotional well-being. The Nebraska Constitutional Amendment denying bail to those charged with rape where the proof is evident or presumption great received a popular vote with a margin of 4 to 1 in favor. To hold such an action unconstitutional in the face of the compelling need and overwhelming popular support would strike a devastating blow to the citizens of that state, to those who fear to go beyond the locked doors of their homes after dark, and to the victims of these increasingly frequent violent crimes. It quite simply would be a major affront to law-abiding citizens and violative of their right to be secure in their persons.

We respectfully submit that the issue goes beyond that of merely making a rational legislative or referendum choice that can stand the test of constitutional muster, although we believe that the test has been well met in this case. It involves the fundamental right of a people to defend their bodies and their minds from the devastating physical and mental damage wreaked by this dreaded, fear-producing crime. It involves a major issue of preserving the physical and mental health of the law-abiding citizens of our country. This court can strike a major blow by its decision in this case to reverse, *here and now*, this disturbing condition which threatens to all but wipe out the social, cultural and economic achievements of our society. As aptly stated by James P. Damos, President of IACP,

> Until we begin to address the needs of crime victims and witnesses on the highest possible priority, I believe we have little hope of a recession in crime rates.
>
> The problem is so pervasive that the perception of crime, as "fear factor" now exceeds the actual incidence of crime . . . A sense of helplessness permeates our society and drives people into a "fortress" mentality, locking themselves in their homes after dark and praying for one

> more day free from crime . . . This nation can ill afford the monumental losses to its cultural development and productivity that are caused by an inability to move freely about our central cities. We must return our lines of communication to the law abiding citizen and get on with the business of producing America's goods and services. *Editorial,* XLVIII The Police Chief 8 (October 1981).

We respectfully submit that the Court's decision should permit the states to adopt statutes and state constitutional provisions giving effect to the needs of our law-abiding citizens, as represented by the following recommendation of L.A.W. in its 1973 Court Reform Blue Ribbon Report, at p. 12:

> The purpose of bail is to provide some assurance that the defendant will appear for trial. There are many factors that bear upon this problem. Some of these factors are whether or not the defendant has roots in the community, the presence or absence of a past criminal record, severity of the crime, etc.
>
> However, these factors only help determine the *amount* of bail that should be set by the court. There are some cases where *no* bail should be set at all because of the fact that the defendant's release poses a real threat to the community or to himself.

CONCLUSION

Amici respectfully submit that the findings of the United States Court of Appeals for the Eighth Circuit be reversed on the law and on the basis of sound judicial policy.

Respectfully submitted,

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NO. 80-2165

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

JAMES L. MURPHY, PETITIONER

V.

EUGENE L. HUNT, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

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BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

CONSENT OF PARTIES

All Parties have consented to the filing of this brief of amicus curiae. Letters of consent have been lodged with the Court.

INTEREST OF AMICUS CURIAE

The Legal Foundation of America ("LFA") is a non-profit corporation supporting the operations of a public interest law firm. Its goals include, among others, the pro-

tection of economic freedom, the attainment of a fair balance between the federal government and the States, and the preservation of a rational system of criminal justice. All litigation undertaken by LFA is approved by its board of Trustees, a majority of whom are attorneys. LFA is funded by contributions and does not receive private fees.

LFA does not express an interest in the precise provision of the Nebraska Constitution at issue here. However, LFA does believe that limited denial of bail is essential to a rational system of criminal justice. Furthermore, LFA submits that this honorable Court should not restrict the fifty sovereign States to a single, specific form of bail denial statute. For example, the District of Columbia model of bail denial has been advanced by some as a "preferable" model. That statute does have certain characteristics to recommend it, but it is not unambiguously superior to the Nebraska

model. The Nebraska provision at issue here has certain advantages that are not shared by the District of Columbia model.

STATEMENT OF THE CASE

Eugene L. Hunt was arrested and charged in Omaha with four particularly obnoxious rapes, involving the use of guns or knives, one committed against a 13-year-old girl. He was denied bail pursuant to a Nebraska constitutional provision applicable to "sexual offenses involving penetration by force . . . where the proof is evident or the presumption great." This provision had been enacted recently, in 1978, by a popular vote of 356,000 to 80,000, or more than four to one.

For purposes of the bail denial hearing, Hunt stipulated that the proof of his guilt "was evident or the presumption great." He then brought an action in the District Court, below, for his release. The District Court denied relief. The Court of Appeals, how-

ever, reversed. It held that there was a constitutional right to bail in all non-capital cases, and it struck down the Nebraska provision. That decision is now under review in this case.

SUMMARY OF ARGUMENT

I.

Examination of the history of the "excessive bail" clause overwhelmingly indicates that it is not a guaranty of a right to bail. Pre-Constitutional England recognized nonbailable offenses. So did the American colonies and the Pre-Constitutional States. Significantly, these sovereignties allowed bail denial to be done precisely as Nebraska has done it -- by offense category, not by individual offender characteristics.

The historical purpose of the excessive bail clause was to prevent discriminatory application of discretionary bail amounts by local officials and by the King's justices. Accordingly, the excessive bail

clause is a check on the abuse of discretion against individuals by courts, not a prohibition upon uniform and nondiscriminatory legislative enactments.

II.

"Evolving standards of decency" should not be used, expressly or impliedly, to depart from the original intention of this clause. Even if such standards are used, the strong popular vote for this constitutional provision shows that it is not inconsistent with contemporary standards.

III.

This Honorable Court should not prefer an individualized evaluation of dangerousness to other statutory models for bail denial, including dangerous offense categories. Specifically, the Court should not approve the District of Columbia model to the exclusion of other models. The individual-discretion model is arguably less consistent with the purpose of the excessive

bail clause, since it introduces elements of judicial discretion that can be abused. Furthermore, there is some evidence that the best predictor of dangerousness is recent behavior; individualized, personality-based predictions of dangerousness are arguably less reliable.

It could thus be argued that the Nebraska model is more clearly consistent with the purpose underlying the excessive bail clause than the District of Columbia model. This brief does not depend upon that argument, however. In a federal system, this Court should allow different kinds of statutes to exist among the fifty States, and it should not attempt to decide which model is "best" or to impose that judgment upon the legislative branch.

IV.

The due process and equal protection clauses are, of course, applicable to bail denial and set minimum standards here.

I. THE HISTORY OF THE "EXCESSIVE BAIL" CLAUSE SHOWS THAT IT IS A GUARANTY AGAINST DISCRIMINATORY AMOUNTS UNDER DISCRETIONARY BAIL STATUTES, NOT A WHOLESALE GUARANTY OF BAIL IN ALL NONCAPITAL CASES.

"[A] study of the constitutional and statutory provisions which regulate the system of bail in the United States, while revealing an increased regard for the rights of the individual, will nevertheless indicate that there is no constitutional right to bail." Duker, The Right to Bail: A Historical Inquiry, 42 ALBANY L. REV. 33, 34 (1977) [hereinafter cited as Duker] (emphasis added). Duker's is the most thorough recent work on the subject. Indeed, it was cited by the Court of Appeals, even though that Court did not accept Duker's conclusion. The evidence marshalled by Duker is overwhelming.*

A. English Antecedents of the Excessive Bail Clause Acknowledged the Existence

* Accord, Meyer, Constitutionality of Pretrial Detention, 60 GEO. L.J. 1145-64 (1972).

of Legislatively Created Nonbailable Offenses and Were Concerned with Arbitrary Administration of Bail.

The first systematic treatment of bail in England was brought about by the Assize of Clarendon in 1166. Prior to that time, all offenses were bailable. The Assize asserted a new interest of the King in law enforcement. It resulted in a list of non-bailable offenses, including "those arrested by our special command, or that of our chief justice, or for an offense in our forest, or for any other [wrong] for which, according to English custom, he is not replevisable." Duker 44-45. Thus began the tradition of non-bailable offenses, which has continued to the present.

The defect in this system was not the existence of nonbailable offenses. Instead, it was the discretionary administration of the system by local officials who often extracted bribes as a condition of release. The Statute of Westminster I contained an

explicit list of bailable and nonbailable offenses. Duker 45-47. It was hoped that the legislative enactment, which defined availability of bail by offense categories rather than by custom, would remove the discretion that created abuses.

The statute was ineffective to curb local officials, however. By stages, the following occurred: local officials were put under national supervision; local officers were fired wholesale, tried, and reappointed; and local officers were made personally liable in damages. Still, Parliament reported the usage of ransoms without regard for "law, reason or christianity." Duker 47-56. None of this concern was with the existence of nonbailable offenses, but rather with abuses of discretion.

Finally, during the 16th century, Parliament reaffirmed the Statute of Westminister I, with its category of bail-

able and nonbailable offenses, and the cumulative total of its interventions improved local administration. In addition to the nonbailable offenses created by Westminister I, Parliament created others, including certain "vagabonds." Duker 56-58.

During the 17th Century, discretionary and arbitrary denial of bail, engaged in by the King, became a serious issue. By the Petition of Rights, in 1628, Parliament caused the King to accept the "law of the land" (i.e., the list of nonbailable offenses of Westminister I) as the authority for denial of bail. He frustrated this law by delays in habeas corpus, prompting the Habeas Corpus Act of 1677. It provided for bail to be set within 3 days "in any sum, according to [the judge's] discretion, . . . unless . . . for such Matter or Offenses for which by law the prisoner is not bailable." Duker 58-66.

This law enforced Westminister I,

requiring the prompt setting of bail for bailable offenses only. The King's justices frustrated it, however, by requiring bail in excessive amounts for bailable offenses as a means of denying bail. Thus ten years after the Habeas Corpus Act, Parliament passed, and the King accepted, the English Bill of Rights. It closed the loophole by declaring that "excessive bail ought not to be required." This Act did not affect non-bailable offenses, which continued as enacted. Duker 66.

Since the American Constitution's excessive bail clause was derived from the English Bill of Rights, this history should be illuminative of its meaning. The English Bill did not change the long history of bail denial by statutory enactment. Bail denial was done by offense category, just as Nebraska has done. The concern of the excessive bail clause was with discretionary decisions designed to frustrate the right

to bail for bailable offenses. The same concern was expressed in every reform measure following Westminister I, and no reform measure amounted to an effort at wholesale bail guarantees.

B. The Pre-Constitutional American States Recognized Legislative Creation of Non-Bailable Offenses.

Pre-constitutional States recognized the denial of bail by offense categories. Six of the colonies -- Connecticut, Delaware, Georgia, Maryland and Rhode Island -- simply adopted the rights guaranteed in England. Duker 80-81. "However, Englishmen in the homeland possessed no right to bail beyond that allowed by the legislature." Id. In Virginia, the Statute of Westminister I was the "core of the law defining which offenses were bailable." Id. at 78. The colonial Virginia legislature enacted protections for persons obtaining bail, "in such case as by law he or she may be bailable." 3 Va. Stat. 391 (Hening ed. 1923).

In Massachusetts, bail gauranties did not extend to capital cases, contempt of court, or offenses excluded by express act of the legislature. New York and Pennsylvania adopted colony charters limiting denial of bail to capital offenses, but at certain times they had charters allowing broader bail denial.

After 1776, under the Articles of Confederation, the States made even more clear the legislative power to deny bail. In three states, excessive bail was prohibited to be required "by courts," leaving the legislature free to enact denials of bail. In two others, excessive bail was prohibited "for bailable offenses." Three merely enacted denials of excessive bail, and the legislatures freely continued to deny bail. The remainder adopted English law, which allowed legislative bail denial. Duker 81-82.

There are other authors who have con-

cluded that the excessive bail clause creates "an absolute right to bail." E.g., Foote, The Coming Constitutional Crisis in Bail (Pt. I.), 113 U. PA. L. REV. 959 (1965). Foote asserts that Mason, as draftsman, lifted the clause from the English Bill of Rights, and that "critical language which is in the preamble of the English Bill of Rights . . . clearly spells out the basic right to bail . . . drawn together from enactments which in England went back to 1215." In the first place, the English Bill of Rights contains no such universal right of bail. In the second place, the English history before and after the English Bill of Rights included legislative denial of bail. In the third place, the more immediate antecedent to the language chosen by Mason was the charters of the colonies, which allowed legislative bail denial. In the fourth place, the English Bill of Rights was preceded only 10 years

earlier by the Habeas Corpus Act, which denied bail for "Offenses for which by Law the Prisoner is not bailable," and the English Bill of Rights did not in any wise contravene this express language. See generally Duker, supra, at 84 n. 303; accord, Meyer, supra, 60 GEO. L.J. at 1180-90.

The crime at issue here, rape, was nonbailable in all 13 States at the time of adoption of the Constitution. And while it is true that it was a capital offense, there is no reason to conclude that the Founders would have otherwise regarded it as bailable of right. The Court of Appeals concluded that the only historical reason for bail denial in capital cases was the unlikelihood that any security would ensure appearance for a punishment of death. It is at least as plausible that the long history of selective bail denial in both capital and non-capital offenses was the reason.

II. "EVOLVING STANDARDS" SHOULD NOT PRECLUDE NEBRASKA'S ENACTMENT.

In some cruel-and-unusual-punishment cases, "evolving standards of decency" have been considered as replacing historical constitutional guarantees with contemporary concepts. E.g., Gregg v. Georgia, 428 U.S. 153 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). It is submitted that this doctrine should not be extended to other constitutional provisions, including the excessive bail clause. The resulting intentional departure from the intent of the framers would reduce the constitution to a public opinion poll.

However, if contemporary attitudes are considered, adoption of this enactment by popular will in Nebraska's Constitution is significant. The majority of more than four to one by which it was passed indicates that it is not inconsistent with contemporary standards of decency.

III. THIS COURT SHOULD NOT REQUIRE THE SEVERAL STATES TO ADOPT A UNIFORM MODEL OF BAIL DENIAL.

The Court of Appeals concluded that denial of bail because the person has committed a legislatively-defined dangerous offense is improper, but that bail might properly be denied upon a judicial holding that the individual himself is dangerous. This reasoning should be rejected.

A. The Nebraska Approach is At Least as Consistent with the Purposes of the Excessive-Bail Clause as a "Dangerous Individual" Approach Would Be.

The Court of Appeal's approach requiring individualized finding of dangerousness introduces judicial discretion of the least controllable variety into the bail denial decision. The likelihood that bail will be denied to poor and racial minorities, and granted to middle-class defendants, is enhanced by this requirement. The Nebraska approach -- that if bail is to be denied, it is to be denied on the basis of conduct,

rather than personality -- treats each individual similarly. It further ensures that the legislature is unlikely to allow preventive detention for any but the most dangerous offenses; if personality factors could be considered, the legislature might lower the behavioral standard by including more offenses. Finally, the Nebraska approach utilizes preventive detention on the basis of what an individual has done rather than who he is.

For these reasons, the Nebraska approach is at least as consistent with the historical purpose of the eighth amendment as would be the approach preferred by the Court of Appeals. Abuses of judicial discretion undertaken on an individual basis provided the motivation for the excessive bail clause. Uniform legislative enactments were not its concern.

B. Nebraska Could Rationally Have Concluded that Behavior Was a More Accurate Predictor of Dangerousness than Personality.

The psychiatric profession insists on its inability to predict dangerousness from personality factors. The most reliable indicator of dangerousness, it appears, is behavior -- the commission of a criminal offense or offenses. See, e.g., A. FREEDMAN, H. KAPLAN & B. SADOCK, SYNOPSIS OF MODERN TEXTBOOK ON PSYCHIATRY 1220-22 (1972). There are even some who insist that "individual" decisions, based on personality, result in serious overprediction of violence.

Nebraska could rationally have accepted this concept. It could have concluded that the most reliable predictor of dangerousness, even in an "individualized" system, would remain the offense itself; that the addition of personality factors would not appreciably improve accuracy, and indeed might decrease it; and that addition of judicial discretion would induce more unconscious invidious discrimination than any gain in accuracy could justify. Such reasoning would ful-

ly comply with the historical purpose of the bail clause to check judicial discrimination.*

Forcible rape is as dangerous and repeatable as Nebraska categorized it. Recidivism rates are very high. Commission of the offense is rarely isolated; many forcible rapists act periodically and commit dozens of similar offenses. Indeed, denying bail for the capital offense of murder while granting it for rape would in at least one sense be irrational, even though favored by the Court of Appeals. Murder has far lower recidivism rates than rape (and this is so even though detection rates are high for murder and low for rape).

C. Nebraska Could Rationally Have Concluded that Bail Denial Was Necessary for Orderly Trial of Forcible Rape Cases.

---

* For a defense of the view that judicial prediction of dangerousness can, indeed, be accurately done, see, e.g., Meyer, supra, at 1146-49; see also Jurek v. Texas, 96 S.Ct. 2950 (1976). There can be different views on this question, and there are advantages to both statutory models.

One historical reason for bail denial has been the assurance of an orderly trial. Thus the accused can clearly be denied freedom during the trial itself. Bail denial during trial has, historically, been used even when pretrial bail was allowed, and bail denial has been used as a means of providing security to witnesses and jurors. See Duker, supra, at 109-19.

Orderly prosecution of rape cases depends to a unique degree upon the cooperation of victims whose personal security has been invaded and is still perceived as threatened by the victim herself. And it is to be remembered that Nebraska's bail denial operates only when proof is "evident;" i.e., on overwhelming proof of rape by force. Most bail releases are done early, within hours of the setting of bail, if bail is posted at all. Such release seriously undermines the confidence of the rape survivor in the criminal justice system

and in her own security. Permanent psychological effects can follow, as can an inability to provide for orderly trial. Nebraska's interest in preventing these effects should not be disregarded.

D. This Court Should Not Prefer the District of Columbia Bail-Denial Statute to this Nebraska Provision, Nor Vice Versa.

It has been reported that counsel for Respondent may, in this Court, argue that while some bail denial laws (such as the District of Columbia Model) may be constitutional, Nebraska's law should be struck down as providing "no standards." NATIONAL L. J., Oct. 7, 1981, at 3.

It is true that the District of Columbia model provides certain safeguards that are not provided by this Nebraska law. It provides a requirement of certain fact-findings, requires "dangerousness," and allows only a brief period of detention. However, it is equally true that the

Nebraska provision protects individuals in ways not provided for by the District of Columbia, which makes its findings based on hearsay and does not require strong proof of guilt. Nebraska, by requiring courtroom proof that is "evident," places a higher emphasis upon likelihood of conviction and thus protects more carefully than the District of Columbia against pretrial detention of innocent persons.

The point here is not to argue the inadequacies of the District of Columbia model. Rather, the point is that it is not unambiguously superior to the Nebraska law, as Respondent may argue. It is submitted both laws are constitutional. In a federal system such as ours, there should not be merely one "approved" statutory model of this type.

E. The Bail Denial Provisions of Texas Are an Example of a Statutory Scheme That Should Be Upheld, Though Inconsistent with the Reasoning of the Court of Appeals.

This Amicus Curiae's principal office is in Texas, and accordingly it has greater familiarity with the laws of that State than any other. It is submitted that the Texas bail denial statutes provide an example of a rational, constitutional approach, though it is an approach that conflicts with the Court of Appeals' reasoning.

Texas allows bail denial in three situations: first, in capital cases in which proof is evident; secondly, in certain cases in which the accused has prior convictions or record, on "substantial" evidence of guilt; and third, when the accused is incarcerated pending hearing of a motion to revoke his probation. TEX. CONST. art.1, 11-11a (Vernon Supp. 1981); ex parte Jones, 460 S.W.2d 428 (Tex. Crim. App. 1970).

The most notable category of prior-offense bail denial is that in which the defendant has sequentially been twice before convicted of felonies, so that he is

subject to a quasi-mandatory life sentence upon conviction. This categorical definition is reasonable, even though the statute does not provide individualized factors, both because the potential life sentence, being mandatory, provides incentives for non-appearance and because one twice sequentially* convicted of felonies, and

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* The sequence must be: first crime, first conviction; second crime, second conviction; third crime, third conviction. The mere existence of two prior convictions is not enough to invoke the quasi-mandatory sentence of life imprisonment. Thus two separate incarcerations must precede the current conviction.

TEX. CONST. § 11a also allows bail denial for a previously convicted felon who uses a deadly weapon in the commission of a sequentially later felony crime (such a person being subject, as is a habitual, to an enhanced sentence), and to persons who commit felonies while on bail from previously committed felonies.

In each instance, bail denial may last only 60 days. Strict proof, under the trial rules of evidence, is required (i.e., no hearsay is allowed absent exceptions). No individualized factors are required to be considered; nevertheless, these provisions are rational and constitutional, it is submitted.

shown by "substantial" proof to have committed a third after his two separate incarcerations, can rationally be deemed to be likely to repeat his offense. Cf. Spencer v. Texas, 385 U.S. 554 (1967); Rummel v. Estelle, U.S. (19)(individualized determination of sentence not required). Denial of bail pending probation revocation is appropriate for similar reasons, and for the additional reason that it is a prelude to relatively certain sentencing for an already certain conviction.

The Court of Appeals' opinion, in that it appears to provide an individual right to bail in all non-capital cases, seems to undermine these rational bail denial categories. The Court of Appeals' reasoning is particularly questionable if it requires individualized bail determination in third-conviction, habitual criminal cases, as to which even a life sentence does not require such determination. Rummel v.

Estelle, supra,

IV. THE FOURTEENTH AMENDMENT AND OTHER CONSTITUTIONAL PROVISIONS ARE MINIMUM STANDARDS FOR THIS AND OTHER BAIL DENIAL APPROACHES.

Due process, equal protection and other constitutional provisions are more appropriate minimum standards for bail denial than is the excessive bail clause, given its history and purpose. These provisions would prohibit a bail denial scheme that was arbitrary, unnecessary, or protected by insufficient procedural safeguards.

Equal Protection. Bail denial upon lesser offenses, or distinctions in bail availability for relatively similar situations, might offend the equal protection clause if unreasonable.

Due Process. A fair and full hearing on rational evidentiary principles, a relatively high proof standard, and a brief durational period seem minimum standards under this clause. A standard of "proof ev-

ident" should imply proof that is "clear" and "strong," approaching the beyond-reasonable-doubt standard if not exceeding it. The Texas courts' construction of this requirement, for example, has been stringent; it has led to reversal of the majority of early bail denials even in capital cases on appeal. Ex parte Wilson, 527 S.W.2d 310, 311 (Tex. Crim. App. 1975); Crump, Capital Murder: The Issues in Texas, 14 HOUSTON L. REV. 531, 539-40 (1977)(capital bail denial on "proof evident" standard). There may be some question whether Nebraska courts have followed a unitary or sufficiently high* standard of proof. In addition, there is

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* A survey by Omaha's public defender's office of 32 persons to whom bail was denied under the provision in question apparently has shown that two were convicted of the charge, fifteen were convicted of lesser offenses, two were acquitted, three had charges dismissed, and 10 remained pending. While compromise verdicts or plea bargained convictions may account for many of the lesser-charge convictions (and possibly even some of the dismissals), the re-

no explicit time limit upon Nebraska's denial of bail. Due process may require that the Nebraska legislature or courts supply a test in this regard. Cf. TEX. CONST. art. 1, § 11a, supra (60-day limit for trial of defendant denied bail).

Amicus curiae submits that the Nebraska provision is sufficiently rational and nondiscriminatory to comply with equal protection and substantive due process requirements. It has insufficient information as to the actual application of the provi-

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maining dismissals and acquittals, if the survey is correct, show the need for a high proof standard. See NATIONAL L.J., supra, at 18.

In any event, Amicus curiae submits that these figures are relevant to the proof standard under the due process clause, not to the type of statutory conditions required for bail denial. That is to say, the survey is not peculiar to non-individualized bail denial statutes; indeed, less satisfactory results might flow from a standard with individualized consideration of dangerousness. Due process in the form of strong proof, not application of the excessive bail clause, is the proper constitutional provision to address the issue.

sion to express an opinion on its compliance with procedural due process requirements.

CONCLUSION

This honorable Supreme Court should not disallow bail denial pursuant to valid legislative enactments. It should recognize that the history underlying the excessive bail clause reflects a concern for arbitrary administration of discretionary bail; that it is directed to the courts, not to legislatures; and that it does not disallow uniform and nondiscriminatory enactments for bail denial. Finally, the Court should not require that the several States limit themselves to a single form of statute on bail denial (such as the District of Columbia model). While that model has some features to commend it, so does the Nebraska provision, and it is arguably more consistent with the historical purposes of the excessive bail clause.

The due process and equal protection clauses should, of course, be deemed to set minimum standards for statutes or other provisions for denial of bail.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have, pursuant to Rule 28.3 of this Court, served 3 copies of this Brief by mailing same at the central post office, Houston, Tx., first class postage prepaid, to all counsel of record, addressed to Terry R. Schaaf, 2115 State Capitol, Lincoln, Neb. 68509, and to Bennet Hornstein, Asst. Pub. Defender, 306 Hall of Justice, 17th & Farnham, Omaha, Neb. 68183, on _____, 1981.

_____

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No. 80-2165

IN THE
Supreme Court of the United States

OCTOBER TERM, 1980

JAMES M. MURPHY, District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska,

Appellant,

v.

EUGENE L. HUNT,

Appellee.

On Appeal From
The United States Court of Appeals
For The Eighth Circuit

BRIEF OF AMICI CURIAE THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLEE

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IN THE

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INTEREST OF AMICI CURIAE

The National Legal Aid and Defender Association (NLADA) is a nonprofit organization whose primary purpose is to promote effective legal assistance for indigent persons; its membership includes the majority of public defender offices, coordinated assigned counsel systems, and legal services agencies in the United States, and 2,000 individual members, most of whom are private practitioners.

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia nonprofit corporation whose membership consists of more than 2,000 lawyers throughout the United States, all of whom are primarily engaged in working with the criminal justice system, as advocates, law professors, and judges of the state and federal courts. NACDL's objectives are to promote the proper administration of criminal justice, the protection of individual rights, and the improvement of the Criminal law, its practices and procedures, through study, research, educational programs, and publications.

Both NLADA and NACDL are deeply concerned and troubled by the State of Nebraska's attempt to curtail the precious right of its citizens to bail and the ominous implications of such denial for the future of individual liberty in that State and in this country should this Court uphold that deprivation. In this regard, Amici share the views implicit in the remarks of Justice Story many years ago:

> "The provision [Eighth Amendment] would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct [denial of the right to bail]." (Story on Constitutional Law, 5th ed., Vol. 2, p. 650.)

Space limitations have caused Amici to confine their argument to two primary issues — the effect of the Nebraska bail provision on Sixth Amendment rights, and its validity under the Equal Protection Clause. This is not to imply any lesser concern for the other important constitutional issues herein. In general, Amici fully support the arguments of the Appellee and the views of the Eighth Circuit below.

Both parties have provided written consent to the filing of this brief.

ARGUMENT

I. ARTICLE 1, SECTION 9, OF THE NEBRASKA CONSTITUTION VIOLATES SIXTH AND FOURTEENTH AMENDMENT GUARANTEES OF PERSONS ACCUSED OF VIOLENT SEX OFFENSES BY DEPRIVING THEM OF THEIR RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, SELF-REPRESENTATION, AND "THE FULLEST POSSIBLE DEFENSE."

A. The "Traditional Right Of Freedom Before Conviction" Is Directly And Significantly Related To The Rights Protected By The Sixth Amendment.

The important relationship between the right to bail and the rights encompassed by the Sixth Amendment was stressed long ago in *Stack* v. *Boyle*, 342 U.S. 1 (1951). In setting aside as "excessive" the bail settings for various Smith Act defendants, Chief Justice Vinson, writing for an unanimous Court, stated:

> "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle would lose its meaning." (342 U.S. at 4.)

In a concurring opinion, Justice Jackson, joined by Justice Frankfurter, further added that,

> "The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until the trial has found them guilty. Without this conditional privilege, even those wrongfully accused are punished by a period of imprisonment while awaiting trial *and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense.*" (342 U.S. at 7-8; emphasis added.)

An arbitrary and unjustified revocation of bail during trial was also described by this Court as "unjustified and . . . unwarranted burden upon defendant and his counsel in the conduct of the case," in *Bitter* v. *United States*, 389 U.S. 15, 17 (1967).

A fair trial is, of course, a fundamental requirement of due process. (*In re Murchison*, 349 U.S. 133, 136 (1955). And the right to effective assistance of counsel is essential to a fair trial (*Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963).) Moreover, to ensure the attainment of that important goal, counsel is required at all "critical stages" of a criminal prosecution. (E.g., *Miranda* v. *Arizona*, 384 U.S. 436 (1966) (in-custody interrogations); *Gilbert* v. *California*, 388 U.S. 263 (1967) (lineups); *Coleman* v. *Alabama*, 399 U.S. 1 (1970) (preliminary hearings).) Furthermore, the Sixth Amendment requires that counsel's assistance be "effective and substantial" and not merely *pro forma*. (*Powell* v. *Alabama*, 287 U.S. 45, 53 (1932).) This includes adequate opportunity to investigate and to prepare for trial. (*Id.*, at 58; *Avery v. Alabama*, 308 U.S. 444, 446 (1940). See also, *Wolfs* v. *Britton*, 509 F.2d 304 (8th Cir., 1975) (counsel improperly appointed a mere day and a half before trial); *United States* v. *Venuto*, 182 F.2d 519 (3rd Cir., 1950) (defendant improperly forbidden to confer with counsel during an 18 hour recess).)

Chief Justice Burger has observed that, "[B]oth the 'spirit and the logic' of the Sixth Amendment are that every person accused of crime shall receive the fullest possible defense. . . ." (*Faretta* v. *California*, 422 U.S. 806, 840 (1974) (dissenting opinion).) That Amendment has been described by this Court as "constitutionaliz[ing] the right in an adversary trial to make a defense as we know it," and not merely that such defense "shall be made *for* the accused, [but that] it grants to the accused *personally* the right to make his defense." (*Id.*, at pp. 818-819; emphasis added.)

Obviously, the Nebraska bail provision significantly affects the Sixth Amendment right of self-representation, let alone the right to effective assistance of counsel. Can there be any doubt but that Nebraska's denial of bail to persons accused of violent sex offenses virtually emasculates their right of self-representation? And, surely, such denial of bail must be deemed, at a minimum, to significantly hamper what Chief Justice Burger described as the Sixth Amendment right of "every person accused of crime [to] receive the fullest possible defense."

This Sixth Amendment right of "every person accused of crime [to] receive the fullest possible defense" lies at the heart of the issue of the constitutionality of the Nebraska bail provision. If, indeed, "the traditional right to freedom before conviction permits the unhampered preparation of a defense" — as stated thirty years ago in *Stack* v. *Boyle, supra*, then it cannot be doubted that the Nebraska provision denying such freedom to accused sex offenders cannot stand. Despite this clear language, appellant asserts it is "fallacious" to contend that an accused "has a constitutional right to be free from custody after being charged with a crime in order to assist in the preparation of his defense." (Appellant's brief, hereinafter "BOM," p. 36.) Utterly ignoring *Faretta* and the entire " 'spirit and logic' " of the Sixth Amendment, appellant also erroneously asserts that an accused is entitled to nothing more than the right "to consult with his attorney" and for his attorney to be "given adequate time and opportunity to prepare his defense." (BOM 36)

Appellant's only support for this contention is the further assertion that, "The logical extension of the appellee's reasoning would be to render unconstitutional . . . all pretrial detentions, including those situations where a reasonable bail has been fixed which the accused is unable to meet." (BOM 36)

The short answer to this argument is that it simply begs the question of the validity of the State of Nebraska's complete

denial of *any* bail at all for alleged violent sex offenders. Obviously, if an accused cannot provide "reasonable bail," then under the "traditional right to freedom before conviction," referred to in *Stack* v. *Boyle, supra,* an accused must be detained in deference to the State's interest of assuring the defendant's appearance. However, the State of Nebraska, in this case, urges a radical departure from that "traditional right," contending that irrespective of an accused's ability to give reasonable assurance of appearance, he may be imprisoned on the basis of the "heinous nature" of the offense. In another context, Justice Stevens has warned that if such a doctrine were ever adopted, . . . it would work a fundamental change in the character of our free society." (*Bell* v. *Wolfish,* 441 U.S. 520, 579 (1979) (dissenting opinion).)

B. The Denial Of Bail Has Severe Adverse Effects On The Exercise Of Sixth Amendment Rights.

The adverse practical effects of pretrial imprisonment on an accused's ability "to receive the fullest possible defense" under the Sixth Amendment is indisputable. These effects include impairment of the ability of the accused to personally locate and confer with potential defense witnesses. (*Cf., Smith* v. *Hooey,* 393 U.S. 374, 379-380 (1969).) It also significantly detracts from counsel's duty to investigate thoroughly the facts and law of the case. (See ABA *Standards Relating to the Defense Function* (Approved Draft, 1971) Std. 4.1.) In the conduct of such investigation, the accused's assistance can be vital to location of defense witnesses, especially those in low-income, minority neighborhoods where residents are often suspicious and uncooperative. (See Amsterdam, Segal and Miller, *Trial Manual 3 for the Defense of Criminal Cases* (1974), sec. 75 A, p. 1-61; Calif. Continuing Education of the Bar, *California Criminal Law Practice* (1974), sec. 3.9, p. 113.)[1]

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[1] An example of the value of a defendant's assistance in locating witnesses was portrayed in an article in the *New Yorker* magazine. (Kahn, *Annals of Law,* New Yorker, Feb. 6, 1971, p. 76, reported in Katz, Litwin &

An accused's ability to exercise his Sixth Amendment rights is further affected by the adverse physical conditions of most jails, by restricted telephone and visiting privileges, and by limited opportunity to consult privately with counsel. Attorney-client consultations are severely hampered by the lack of private interview rooms in many jails, and the travel time and frequent delay experienced by lawyers in gaining entry and access to their clients in pretrial custody. These circumstances impair attorney-client communications and rapport, which are so vital to effective assistance of counsel. They also generate a vicious cycle of hostility and distrust between attorneys and clients that is the very antithesis of the trust and confidence that are essential to effective representation. (See ABA *Standards Relating to the Defense Function, supra,* Std. 3.1, p. 201.) This was aptly described in a study of 1,660 felony defendants in pretrial custody in Cleveland, Ohio, reporting:

> "An accused in jail is of little value to his attorney during the preparation of his defense. Unlike [the bailed defendant], he cannot look for witnesses or personally contact anyone who might be able to assist in his trial defense, and his attorney must consequently assume complete investigatory responsibility. In many ways the jailed defendant is an absolute liability to his defense counsel, since the attorney must go to the jail every time he wants to see his client or consult with him on a particular fact.
>
> "Frequently, the defendant in jail is virtually forgotten by his attorney; rather than consult with his client every time a

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Bamberger, *Justice Is The Crime: Pretrial Delay in Felony Cases* (1972) pp. 149-150.) The defendant (Thomas Goins) was arrested for possession of 600 glassine envelopes containing heroin which he had turned in to the police, claiming he had found the contraband on a New York City street. His employer helped him make bail and supplied him with a competent attorney. Under the latter's direction, he located witnesses to the event, which had occurred the night before, resulting in the dismissal of the charges. Had Goins been unable to secure his quick release and to return to the scene, the witnesses who had seen him pick up the envelopes in the street would probably not have been located.

> question comes up, the attorney must defer looking into the matter until it is convenient to visit the jail. The jails are filled with defendants who have been waiting for trial for several months and who complain bitterly that in all that time they have seen their attorneys only once or twice." (Katz, *Justice Is The Crime, op. cit. supra,* p. 150.)

The difficulties experienced by public defenders in conferring with incarcerated indigent clients may well explain the deep distrust and unfavorable attitude that typify the attitude of most defendants toward public defenders. (See Casper, *Criminal Courts: The Defendant's Perspective* (1978) 33, 35-36.)

The deleterious effects of pretrial imprisonment have been well documented in several studies over the past 20 years. (See Rankin, *The Effect of Pretrial Detention,* 39 N.Y.U.L. Rev. 641, 642 (1964); *The Unconstitutional Administration of Bail: Bellamy* v. *The Judges of New York City,* 8 Crim.L.Bull. 459 (1972); Katz, *Justice Is The Crime, op. cit. supra,* p. 151.) Each of these studies was controlled for variable factors, such as prior record, the amount of bail set, seriousness of the charge, type of counsel, etc., and they all found a substantial disparity in case dispositions based upon whether or not the defendant was in pretrial custody. The New York City study, which was the most sophisticated, found that a first offender in pretrial detention was three times more likely to be convicted and was more than twice as likely to receive a prison sentence *than a released defendant with more than ten prior arrests!* (*The Unconstitutional Administration of Bail, op. cit. supra,* 8 Crim.L.Bull. at 460.) When the factors of seriousness of the crime, prior criminal record, family ties and employment status were controlled, detained defendants were 41% more likely to be convicted and sentenced to prison than those released. Pretrial status was found to be more than three times as important as either the seriousness of the crime charged or prior record in determining whether a defendant would be convicted and sentenced to prison. In fact, pretrial status was more important than all other factors combined. (*Id.,* at 480-481).

Professor Foote in evaluating Professor Rankin's study data concluded that among the major reasons for this disparity were loss of employment, affecting a defendant's ability to earn a fee to employ his own counsel (as well as ability to obtain probation and support his family), and poorer legal representation due to the adverse physical environment of the interview process and the remoteness of the jail. (Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. Pa. L. Rev., 1125, 1147 (1965).) Similarly, Professor Katz and his colleagues cited the ability of the bailed defendant to "build a record," i.e., employment, family ties, exemplary conduct, during delayed disposition. (Katz, *Justice is the Crime, op. cit. supra*, p. 152.) Another commentator cited the pressure of miserable jail conditions and the delays in getting to trial causing in-custody defendants to waive their rights and plead guilty. (Thaler, *Punishing The Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 Wisc. L. Rev. No. 2, 441, 457-458.)[2]

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[2] The insidious pressure of pretrial imprisonment on the innocent to give up their Sixth Amendment rights was poignantly illustrated in the dialogue between an attorney and his client, reported in Mills, *I Have Nothing To Do With Justice*, Life, March 12, 1971, at 62. . . . the defendant was told that if he were to plead guilty he would "walk today," he offered to plead guilty, yet insisted upon his innocence. But the attorney told him that his plea would not be accepted if he was not "guilty of something." Whereupon the defendant insisted that he "didn't do nothing," and his attorney replied:

" 'Then you'll have to stay in and go to trial.'

" 'When will that be?' 'In a couple of months. Maybe longer.'

"Santiago has a grip on the bars. 'You mean if I'm guilty I get out today?'

" 'Yes.' . . .

" But if I'm innocent, I got to stay in?'

" 'That's right.' . . .

"It's too much for Santiago. He lets go of the bars, takes a step back, shakes his head, turns around and comes quickly back to the bars.

" 'But, man' ____ ."

The State of Nebraska in its bail provision would now extend these adversities that afflict the Sixth Amendment rights of those unable to afford bail or who are otherwise unable to give assurance that they will appear in court. By a strange twist of logic, appellant attempts to justify this by the argument that unless this Court upholds the constitutionality of this new imposition, the Court will have to remedy other, existing evils. Thus, by this logic, new evils are justified on the basis of old ones! And by this argument, this Court is asked to allow Nebraska to deny the "traditional right of freedom from conviction [which] permits the unhampered preparation of a defense" to those charged with the "heinous" offense of violent sexual assault — who, if innocent and the victims of incriminating circumstances, are most in need of the benefits of the Sixth Amendment, i.e., "the fullest possible defense."

C. Defendants Accused Of Heinous Sex Offenses Must Be Accorded The Fullest Possible Protection Under The Sixth Amendment.

The facts of this case present a remarkable irony in light of the historic recognition given by our Anglo-American law that " 'rape . . . is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.' " (*People* v. *Rincon-Pineda*, 14 Cal.3d 864, 874, 123 Cal.Rptr. 119, 538 F.2d 247 (1975), quoting 1 Hale, *History of the Pleas of the Crown* (1st Am. ed. 1847), p. 635.) Lord Chief Justice Mathew Hale of the King's Bench, 1671-1676, was the source of that observation which was based upon his long experience in presiding at trials of rape charges, and it became a standard cautionary instruction given to juries in such cases in this country as well as England over the next three centuries.[3]

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[3] Examples of recent decisions upholding the instruction include, *Beasley* v. *State*, 258 Ark. 84, 522 S.W.2d 365 (1975); *People* v. *Carr* (Colo. App. 1975) 541 P.2d 104; *Kennedy* v. *State* (Wyo. 1975) 470 P.2d 372, *cert. denied*, 401 U.S. 939. See also, Anno. 92 ALR2d 866.)

California's experience with this cautionary instruction is especially relevant to the issue presented in this case. Until 1975, California courts were required to give this cautionary instruction in all sex offense prosecutions. However, at that time, in *People* v. *Rincon-Pineda, supra,* the California Supreme Court ruled that the instruction would no longer be "mandatory." In arriving at that conclusion, former Chief Justice Wright, the author of the court's opinion, engaged in an extensive historic analysis of the instruction. He concluded that the admonition to juries that rape was easily made and hard to defend was no longer necessary because of the increased protection provided to criminal defendants accused of such offenses in modern trials by virtue of rights guaranteed under the Sixth Amendment! Thus, he observed that,

> ". . . [F]undamental precepts of due process [presumption of innocence and proof beyond a reasonable doubt] . . . [and] [t]he rights of an accused to present witnesses in his defense and to compel their attendance, subsequently enshrined in the Sixth Amendment, [were] barely nascent in the 17th Century. . . . Most importantly of all, in the context of a rape case, one accused of a felony in [Lord Chief Justice] Hale's day had no right whatsoever to the assistance of counsel . . ." (14 Cal.3d at 878)

In language fraught with vital significance to this case, Chief Justice Wright concluded:

> ". . . Considering that under the Anglo-Saxon adversarial system of justice 'when a prisoner is undefended his position is often pitiable, even if he has a good case' (1 Stephen, *supra,* at p. 442) [History of the Criminal Law of England (1833)], we recognize that there may well have been merit to Hale's assertion that a prosecution for rape was an ideal instrument of malice, since it forced an accused, on trial for his life, to stand alone before a jury inflamed by passion and attempt to answer a carefully contrived story without benefit of counsel, witnesses, or even a presumption of innocence. But the spectre of

> wrongful conviction, whether for rape or for any other crime, has led our society to arm modern defendants with the potent accouterments of due process which render the additional constraint of Hale's caution superfluous and capricious." (*Ibid.*)

We do not suggest that it is the purpose of the State of Nebraska, under Article I, Section 9, of its constitution to revert to the ancient practices our nation's founders sought to avoid by means of the Sixth Amendment, yet it is clear that Nebraska has made one small, but significant, backward step in that direction. This requires reminder of the classic admonition by Justice Bradley in *Boyd* v. *United States*, 116 U.S. 616, 635 (1885), that,

> ". . . It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed."

II. ARTICLE 1, SECTION 9, OF THE NEBRASKA CONSTITUTION VIOLATES THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY DEPRIVING PERSONS ACCUSED OF VIOLENT SEX OFFENSES OF EQUAL PROTECTION OF THE LAW.

The Appellant denies that the so-called "strict scrutiny test" for equal protection violations governing "fundamental rights" applies. This is based on the erroneous premise that the right to bail is not "fundamental." Appellant finds no support for that premise in any holding of this Court. On the contrary, *Stack* v. *Boyle, supra,* and the other authorities discussed above under Point I clearly oppose it. Since Appellant has not attempted to justify Nebraska's discriminatory bail classification under the "strict scrutiny" standard, he apparently concedes that the provision cannot pass constitutional muster under that test. Appellant's argument also fails to justify the classification under the lesser, "rational relationship test."

A. Denial Of The Right To Bail To Persons Accused Of Violent Sex Offenses Is Subject To The "Strict Scrutiny Test" Of Equal Protection.

An analysis of what constitutes deprivation of "fundamental rights" for the purpose of the "strict scrutiny" equal protection test was presented in *San Antonio Independent School District* v. *Rodrigues*, 411 U.S. 1 (1973), which involved the validity of the Texas financing system for public school education. The issue whether "education" was "fundamental" was determined by "assessing whether . . . a right to education [was] explicitly or implicitly guaranteed by the Constitution." (411 U.S. at 33-34). The majority opinion by Justice Powell cited as examples of right, "implicitly guaranteed": the right to vote (*Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663 (1964)) and the right of procreation (*Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Roe* v. *Wade*, 410 U.S. 113 (1973)). The nexus between these rights and any express constitutional provision is obviously far more tenuous than that of the right to bail and the Eighth Amendment!

The *Rodrigues* Court also indicated, in its restatement of the "strict scrutiny test," that, if such "fundamental freedoms" were merely " 'impinge[d] upon,' " that would require the Court to scrutinize the statutory classification to determine if it was " 'not merely *rationally related* to a valid public purpose but *necessary* to the achievement of a *compelling* state interest.' " 411 U.S. at 34, n. 73, quoting from *Eisenstadt* v. *Baird*, 405 U.S. 438, 447, n. 7 (1972).) Such "impingement," as distinguished from outright denial, was further emphasized by the Court in distinguishing the facts of the other cases (such as those involving the right to vote and the right to procreation), wherein it had applied "strict scrutiny," — noting that those cases "involve[d] legislation which [had] 'deprived,' 'infringed,' or 'interfered' with the free exercise of some fundamental personal right or liberty." (411 U.S. at 37-38) In contrast to those cases, the Court found that the Texas education financing

scheme was "affirmative and reformatory," and therefore, not subject to that strict standard.

In the present case, there can be no doubt that the "free exercise" of a "fundamental personal right or liberty," has been " 'deprived,' " " 'infringed,' " or " 'interfered' " with — viz., the "traditional right to freedom before conviction," explicitly or implicitly guaranteed under the Eighth Amendment and under the Sixth Amendment and under the Sixth Amendment right to "receive the fullest possible defense." Accordingly, the "strict scrutiny" test must be applied and requires that the Nebraska provision be declared invalid under the Equal Protection Clause.

B. Even If Denial Of Bail Does Not Constitute Interference With A Fundamental Right, The Nebraska Bail Provision Is Invalid Under The "Rational Relationship Test."

Appellant asserts that the "differing treatment of sexual offenders apart from other criminal offenders" under the Nebraska bail provision is "reasonable in that it is relevant to the legitimate state purpose of protecting society." (BOM 26). However, Appellant's six page argument in support of this contention offers not one iota of proof to support that assertion. Appellant has simply failed to meet the requirement of showing, "at a minimum, that [the] statutory classification bear[s] some rational relationship to a legitimate state purpose." (*Weber* v. *Aetna Casualty and Surety Company*, 406 U.S. 164, 172 (1972).)

At the conclusion of Appellant's six page discussion of the law, Appellant baldly reasserts that, "[t]he people of the State of Nebraska have reasonably determined that the crime of first degree sexual assault is distinct from other crimes [justifying denial of bail] based on the undisputed fact that rape is of such a heinous nature as to pose a grave threat to society." (BOM 31-32). The problem with this argument is that it merely begs the question whether or not the discriminatory classification bear[s] some rational relationship to a legitimate state purpose."

Surely, it is also an "undisputed fact" that *other* crimes are equally, if not more, heinous, and furthermore, under Nebraska law, such crimes carry even heavier penalties, as detailed in Appellee's brief. Yet the people of the State of Nebraska have not denied bail to those accused of such crimes — including, among others, shooting or stabbing with intent to kill, robbery, kidnapping, arson, and burglary with explosives. Appellant has utterly failed to explain how the crime of first degree sexual assault is any more "heinous" than those crimes, so as to warrant the discriminatory classification that is in issue here. All that Appellant's argument seems to say is that the crime of first degree sexual assault has been "reasonably determined" to be distinct and to warrant denial of bail simply because the people of the State determined that bail should be denied. The mere statement of that argument demonstrates its absurdity.

The denial of bail has traditionally been limited to capital offenses. As explained by the court below, that concept is "at least arguably consistent with one of the purposes of bail. . . . to provide reasonable assurance that the accused would appear for trial and sentencing if convicted. . . . [and that] '. . . it had been thought that most defendants facing a possible death penalty would likely flee regardless of what bail was set, [whereas] those facing only a possible prison sentence would not if bail were sufficiently high.' *United States* v. *Kennedy*, 618 F.2d 557, 559 (9th Cir., 1980)." (*Hunt* v. *Murphy*, 648 F.2d 1148, 1160 (8th Cir., 1981). No such justification has even been suggested by Appellant in the case at bar. On the contrary, Appellant has relied solely upon the "heinous nature" of rape — "pos[ing] a grave threat to society." (BOM 32.)

The opposite conclusion may be drawn from this Court's decision striking down the death penalty for the crime of rape as cruel and unusual in *Coker* v. *Georgia*, 433 U.S. 584 (1977), which was based, among other grounds, on the fact that at the time of the decision, of the 16 states that had authorized capital

punishment for rape prior to *Furman* v. *Georgia*, 408 U.S. 238 (1972), only three had reenacted the death penalty for that offense afterwards. (433 U.S. at 593-594) And while the Court acknowledged that rape deserved "serious punishment," nevertheless,

> ". . . in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if not more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair." (433 U.S. at 598)

Accordingly, the death penalty was held to be excessive for the rapist.

In light of *Coker*, it is clear that no analogy can be drawn, as seems implicit in the Appellant's argument, that the crime of rape, like the crime of murder, justifies the denial of the fundamental right to bail, due to its "heinous nature." *Coker's* reference to the treatment of rape in other States is also instructive here since Nebraska is the *only* State in the Union that has a law denying bail for the crime of rape.

Proper application of the "rational basis test" in this case must rest upon the principles enunciated in *Baxstrom* v. *Herold*, 383 U.S. 107 (1966). The facts of that decision are pertinent. New York statutes permitted continued confinement of convicted criminals who were mentally ill beyond their sentences without a jury trial, as afforded others, and based on mere administrative determinations. Not unlike the argument in the case at bench, the State argued that its classification was reasonable since such persons were not only insane but had proven criminal tendencies as shown by their past criminal records.

And like the present case, the State courts had accepted that argument.

In reversing that judgment, this Court first set forth its classic statement that, "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." (383 U.S. at 111). Applying this rule to the facts, the Court acknowledged that while a reasonable distinction for determining the type of custodial or medical care could be made on the basis of whether mentally ill persons were either insane or dangerously insane, that classification had "no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all*." (*Id.* (Emphasis in original).)

Similarly, in the present case, the State of Nebraska contends that there is a rational basis for denial of bail to defendants charged with rape because of the "heinous nature" of that offense — just as New York State argued that it could classify the insane on the basis of whether they were "dangerously insane." But, as in *Baxstrom*, while the nature of the offense and the severity of its penalty may well determine conditions of release and the amount of bail to insure appearance in court, etc., a classification based on the "heinous nature" of the offense, "has no relevance whatever in the context of the opportunity [to make bail] *at all*." (*Id.*, at p. 111) And like *Baxstrom*, this classification must be deemed "capricious" in light of the fact that the "full benefit" of bail is afforded those charged with equally heinous offenses, such as, shooting or stabbing with intent to kill (§ 28-410, Nebraska Statutes Reissue of 1975), etc. Like *Baxstrom*, "this distinction contradicts all semblance of rationality of the classification." (*Id.*, at 115)

Jackson v. *Indiana*, 406 U.S. 715 (1972), is also instructive here. That decision invalidated an Indiana statute that declared unconstitutional a discriminatory classification of accused per-

sons found presently insane and unable to stand trial. Unlike other alleged mentally ill persons, such defendants were deprived of substantial rights accorded to persons committed under the civil commitment procedures. In a unanimous opinion, authored by Justice Blackmun, the Court sustained that contention, under *Baxstrom* v. *Herold, supra*. The fact of pending criminal charges was held not sufficient to justify such discrimination, and, in language pertinent to the present case, the Court noted that, "[I]f criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others, *the mere filing of criminal charges surely cannot suffice*." (406 U.S. at 724. Emphasis added.)

Like the above statutes, the Nebraska bail provision denies, at the very least, the important "procedural and substantive protection" of bail to a particular class of defendants — those charged with violent sexual offenses. The State purports to justify this classification on the basis of the "heinous nature" of rape (BOM 32), yet it has utterly failed to show that "the distinction made ha[s] some relevance to the purpose for which the classification is made." (*Baxstrom, supra*, 383 U.S. at 111.)

The real question, as indicated by the *Baxstrom-Jackson* analysis, is whether or not the classification of alleged violent sex offenders — as distinguished from alleged attempted killers, kidnappers, robbers, etc. — has relevance "in the context of the opportunity" to post bail. (*Id.*) Appellant has provided no proof whatever of any basis for such discrimination, but has merely asserted that the people of the State "reasonably determined that the crime of first degree sexual assault is distinct from other crimes [and] that rape is of such a heinous nature as to pose a grave threat to society." (BOM 31-32). Similarly, the briefs of amici curiae essentially echo this unsupported assertion and also fail to satisfy the requirement.

The brief of "Laws at Work" (L.A.W.) alludes to this question, stating that, "[A] key issue in the instant case is that of the dangerousness of accused rape offenders *while awaiting trial*." (L.A.W. 17. Emphasis in original.) But, after so stating, that brief merely provides data on the incidence of repeat offenses for convicted and accused rapists and other offenders — it does *not* address what it referred to earlier as the "key issue" of the "dangerousness of accused rape offenders *while awaiting trial*."

Even more significantly the L.A.W. data entirely contradicts any suggestion that rape offenders have a higher recidivist rate. According to their charts on page 18, the incidence of repeat offenses by rapists *is no greater and is often less than* repeat offenses by other offenders. Thus, under the chart labeled, "Table 2, Offender Arrest Record," the recidivist rate for *offenders* with previous arrest records for rape range from a low of 17.5% to a high of 27.8%, which is *substantially below* the recidivist rates for repeat offenders in the "other violent" category, which range *from a low of 28.6% to a high of 40.6%!* Similarly, the chart entitled, "Table 3, Accused With Previous Arrest Records," shows that the previous arrest rates for *alleged* rapists range from a low of 16% to a high of 26%, whereas arrest record rates for persons accused of "other violent offenses" range *from a low of 22% to a high of 38%!*

Thus, the L.A.W. brief data shows that those accused of and convicted for other crimes have substantially higher recidivist rates! And thus, any implication that the Nebraska statute's classification — as it relates to the denial of bail — is somehow rationally related to a higher incidence of repeat offenses by such accused persons is entirely negated.

C. The Latest Available Empirical Data Provides No Support For Either A "Necessary" Or A "Rational" Relationship Between The Classification Herein And Denial Of Bail.

The most recent empirical study of pretrial release practices in eight jurisdictions throughout the country[4] provides important new data on court appearance performance and pretrial criminality. This data is inconsistent with common notions about those subjects and contradicts any theory that the Nebraska bail classification is either "necessary" or even "rationally" justifiable as a measure to prevent crime or to ensure appearances in court by persons accused of violent sex offenses.

The study was conducted by The Lazar Institute of Washington, D.C., and reported in *Pretrial Release: A National Evaluation of Practices and Outcomes — Summary and Policy Analysis* (August, 1981). It was funded by grants from the National Institute of Justice, U.S. Department of Justice. 3,488 defendants were included in the eight-site sample, 85% of whom secured release at some point before trial. 825 defendants were released on financial conditions, and 2,129 were released on nonfinancial conditions; 510 persons were detained. (Lazar Study, *op. cit. supra*, p. 11, Table 4.)

In general, the study found that "the overwhelming majority, 84 percent, of all released defendants in the eight sites had *no* pretrial arrests." (*Id.*, at 20). The overall pretrial arrest rate was 16%, with rates for individual jurisdictions ranging from 7.5% to 22.2%. (*Ibid.*) Pretrial rearrest rates were broken down by specific charge. For the category "Forcible rape," the sample contained 17 defendants who were released and 7 defendants who were detained. Of the released defendants, 14 were *not* rearrested, or 84% — precisely the same proportion as that of

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[4] Baltimore City, Maryland; Baltimore County, Maryland; Washington D.C.; Dade County (Miami), Florida; Jefferson County (Louisville), Kentucky; Pima County, (Tucson), Arizona; Santa Cruz County, California; and Santa Clara County (San Jose), California.

the general pretrial release population! (*Id.*, at 73, Table A-4). And of the 3 defendants who were rearrested, only 1 was convicted of the pretrial rearrest charge. (*Id.*, at 74, Table A-5).

Higher rearrest and conviction rates were reported for *all* other serious crimes, except embezzlement! (*Id.*, at 73). Among these higher rearrest rates were, those who had been released on charges of "Murder, manslaughter" (21.4%), "Robbery" (16.9%), "Aggravated assault" (16.7%), "Burglary" (27.6%), "Larceny, theft" (24.1%), "Auto theft" (29.0%), "Simple assault" (16.2%), "Arson" (30.4%), "Forgery, counterfeiting" (33.8%), "Fraud" (18.3%), "Stolen property" (21.9%), and "Malicious destruction" (18.4%). (*Ibid.*)

The data on failure to appear rates, however, showed that five of the 17 released on forcible rape charges (28.9%) had failed to appear, which was the highest rate, with comparably high rates for "Forgery" (20.8%) and "Fraud" (20.9%), and "Prostitution, vice" (27.9%). (*Id.*, at 72, Table A-3). However, lest any great significance be given to this, the study also reported that overall, 29% of the defendants in all categories who failed to appear had returned to court of their own volition within 30 days, and an additional 16% returned voluntarily afterwards. The others were either returned to court as a result of an arrest (about one-third) or were tried in absentia or forfeited bail (6%). 17% of all the defendants who failed to appear were still at large when the data was collected, leaving an overall "fugitive" rate of just 2%. (*Id.*, at 15).

With respect to the ability to predict court appearance outcomes, the study could not "identify a set of characteristics that could be used to predict with reasonable accuracy the defendants who would fail to appear," and concluded that this reflected "the difficulty of trying to predict an event that is

relatively rare and experienced by persons with diverse characteristics." (*Id.*, at 18)[5]

Thus, it is clear, from this most recent empirical study that it cannot be concluded that the Nebraska bail provision's classification of first degree sexual offenders is either "necessarily" or "rationally" related to any purpose for which bail may be denied. It is simply irrational to deny to this category of accused persons "the traditional right to freedom [which] permits the unhampered preparation of a defense," when others, similarly situated and charged with offenses that are equally, if not more, heinous are accorded that fundamental right.

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[5] With regard to the ability to predict "dangerousness," empirical studies also show that such predictions are "grossly inaccurate," and that incorrect predictions occurred in more than half, and up to 99%, in recent efforts. Martin, *The Prediction of Dangerousness in Mental Health and Criminal Justice*, Pretrial Services Annual Journal, Vol. IV, 3, 14 (1981).

CONCLUSION

For the above reasons, amici curiae respectfully request that the judgment of the Eight Circuit be affirmed.

Respectfu'ly submitted,

NATIONAL LEGAL AID
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No. 80-2165

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES M. MURPHY, District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska,

Appellant,

v.

EUGENE L. HUNT,

Appellee.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

INTERESTS OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION

The Washington Legal Foundation (WLF or Foundation) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 80,000 members, contributors and supporters throughout the United

States, including Nebraska, whose interests the Foundation represents.

More specifically, WLF participates in and devotes a substantial portion of its resources to matters raising criminal justice and related constitutional issues. WLF's concern for the physical, psychological, and financial impact crime has on its victims, their families, and society has led to the Foundation's establishment of a Crime Victims Program. This program is designed to advance the rights of crime victims and to help reduce the alarming crime rate in America. Among other activities, WLF provides legal guidance and assistance to the victims of violent crime, participates in rulemaking proceedings before the U.S. Parole Commission, and monitors those criminal cases in which the courts have been too lenient in sentencing violent criminals and otherwise have exhibited an insensitivity to the rights of victims and the general public.

In the instant case, WLF seeks to advance the interests of its members, the citizens of Nebraska, and the public at large by urging this Court's consideration of the rights of law-abiding citizens, the victims of violent crime, and of the States in protecting their citizens from individuals charged with serious sexual offenses where the proof of their guilt is evident or the presumption great. The Foundation believes that the states must be permitted to deny bail when they reasonably conclude that the release of individuals charged with sexual offenses involving force, will pose a substantial threat to the safety of the citizens of the state. Therefore, Article I, Section 9, of the Constitution of the State of Nebraska, as amended, is a legitimate constitutional response to increasing violent sexual crimes committed by those who would otherwise be released pending trial.

The Washington Legal Foundation has appeared before this court as *amicus curiae* on numerous occasions.

Briefs *amicus curiae* have been filed with and accepted by the Supreme Court in the following recent cases: *Eddings v. Oklahoma*, No. 80-5727 (brief filed August 12, 1981); *Williams v. Zbaraz*, 448 U.S. 358 (1980); *Consolidated Edison Co. of New York v. Public Service Commission of the State of New York*, 447 U.S. 530 (1980); *United Steel Workers v. Weber*, 433 U.S. 193 (1979); *Carbon Fuel Company v. United Mine Workers*, 442 U.S. 939 (1979); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 322 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 323 (1979); *Federal Trade Commission v. Standard Oil Co. of California*, 449 U.S. 232 (1980); *San Diego Gas and Electric Co. v. City of San Diego*, 49 U.S.L.W. 4306 (1981); *Rostker v. Goldberg*, 101 S.Ct. 2646 (1981); *Moody v. Forresster*, 101 S.Ct. 1733 (1981); *First National Maintenance Corp. v. NLRB*, 101 S.Ct. 1510 (1981).

More significantly, WLF recently filed a brief in opposition to petitioner in *Edwards v. United States*, 430 A.2d 1321 (D.C. App. 1981) *petition for cert. filed*, No. 81-5017, in which WLF supported the District of Columbia's preventive detention statute, D.C. Code 1973, § 23-1321 *et seq.*, against charges similar to those made in the instant case, namely that there is a constitutional right to bail under the eighth amendment.

WLF can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues. The present parties to this case are primarily concerned with the end results of this lawsuit. WLF is concerned with the broader public interest issues indicated above and in providing a balance to the arguments in this case. WLF's concern in this case is to protect the rights of any state to deny bail to individuals where it is feared that their release will pose a serious threat to the safety of its citizens.

STATEMENT OF THE CASE

Appellee, Eugene L. Hunt, raped a child. He was also charged with and convicted of two other forcible rapes. *Hunt v. Roth*, 648 F. 2d 1148, 1151 & n. 2 (1981).[1] Hunt was also charged with several counts of non-sexual felonies and one count of nonforcible sexual assault. *Id.*

The Omaha Municipal Court had denied bail on the forcible rape charges on the basis of Article I, Section 9 of Nebraska's Constitution which states:

> All persons shall be bailable by sufficient sureties, except for treason, *sexual offenses involving penetration by force or against the will of the victim*, and murder where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishment inflicted.

Neb. Const. Art. I, § 9 (emphasis added).

The citizens of Nebraska had voted overwhelmingly to so amend their Constitution in November, 1978 to add the above clause concerning sexual offenses. Eugene Hunt had stipulated to the court before bail was denied that the "proof [was] evident" and "the presumption great" that he was a multiple rapist. Subsequently, Hunt filed a habeas corpus petition and a civil rights action under 42 U.S.C. § 1983 claiming he was entitled to bail. Although the District Court rejected his claims, the U.S. Court of Appeals ruled that Hunt was entitled to bail under the eighth amendment of the U.S. Constitution.

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[1] A fourth rape charge was dismissed apparently because the victim had moved and became unavailable to the prosecutor. Furthermore, WLF has learned that Eugene Hunt had a prior conviction of statutory rape in Illinois, although that fact was not known to the Nebraska court or prosecutor at the time of his arrest on the Nebraska charges.

SUMMARY OF THE ARGUMENT

The Washington Legal Foundation submits that the court below seriously erred in ruling that Article I, Section 9, of the Constitution of the State of Nebraska violated the Eighth Amendment to the U.S. Constitution.

The excessive bail clause of the eighth amendment to the United States Constitution does not create a right to bail. It merely provides that excessive bail may not be required by the courts where bail is otherwise proper. Whether a particular criminal offense is bailable or not is for the Congress and the various states to decide. The weight of history, judicial precedent, and the public interest, compel the conclusion that states are free to determine which criminal offenses are to be made bailable, so long as that power to classify is not exercised in an unreasonable or arbitrary manner. The determination by the people of the State of Nebraska that persons charged with forcible rape, where the proof is evident or the presumption great, should not be granted an automatic right to bail, is clearly reasonable in light of the violent nature and heinousness of the crime of rape and its harmful effects on the victims, especially children, and the public at large. Furthermore, the Nebraska bail provision is not violative of the equal protection clause contained in the fourteenth amendment or any other Constitutional provision.

ARGUMENT

I. THE DENIAL OF A RIGHT TO BAIL FOR CERTAIN VIOLENT CRIMES WHERE THE PROOF IS EVIDENT OR THE PRESUMPTION GREAT, FURTHERS THE PUBLIC INTEREST IN PROTECTING SOCIETY FROM VIOLENT CRIMINALS, ESPECIALLY RAPISTS.

A violent crime now occurs every 24 seconds somewhere in the United States. Every 23 minutes, a murder is committed. A woman is raped every 6 minutes. There is a robbery every 58 seconds, and an aggravated assault every 48 seconds.[2]

The striking truth about crime is that we are all vulnerable to its random selection, and becoming increasingly vulnerable as America's crime clock continues to tick at a faster rate, with violent crime increasing 11 percent in 1980.

There has been much written and spoken of the pervasive fear of violent crime which threatens the American way of life. The Chief Justice of the U.S. Supreme Court has recently and poignantly spoken out on the subject of violent crime noting the "reign of terror" which has made Americans "hostages within the borders of our own self-styled, enlightened, civilized country."[3]

Rape is the fastest growing and most frequently committed violent crime in America today. Griffin, *Rape: The All-American Crime*, *in* FORCIBLE RAPE—THE CRIME, THE VICTIM, AND THE OFFENDER 48 (1977).

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[2] U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 6 (Sept. 10, 1981). These statistics are not meant to show the regularity of crimes but rather the annual ratio of crime to fixed time intervals.

[3] Address by Chief Justice Warren Burger to the American Bar Association, in Houston, Texas (Feb. 8, 1981).

In 1960, there were 17,190 reported rapes in the United States, 37,990 in 1970, and 82,088 in 1980. And even this figure is significantly underreported.

> Even with the advent of rape crisis centers and an improved awareness by police dealing with rape victims, forcible rape, a violent crime against the person, is still recognized *as one of the most underreported of all Index crimes.* Victims fear of their assailants and their embarrassment over the incidents are just two factors which can override their decision to contact law enforcement.

U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 15 (1981) (emphasis added). The ratio of unreported rapes is estimated anywhere from one in three to one in five. 2 NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE, FORCIBLE RAPE 3 (1978). Thus, there were in fact anywhere from 240,000 to 400,000 rapes in the United States during 1980.

The violent nature of this crime is particularly egregious. As noted by one commentator:

> Only recently has it been recognized that the primary motive for forcible rape is a desire to inflict humiliation, violence, and harm upon the victim. It is *not* a desire for sexual gratification. Rape is not the result of an uncontrollable sexual urge that is spontaneously released. A person who has committed such a violent, psychologically motivated crime is capable of committing a similar crime while free on bail.
>
> Those charged with forcible rape pose a significant threat to society and to their victims. They should not be released on bail pending trial. Members of the community, as well as a criminal defendant, have a constitutional right to life and liberty and should

> not have to sacrifice their lives or safety as a price of granting bail to a dangerous rapist prior to trial.

Note, *Forcible Rape and the Right to Bail*, 17 SAN DIEGO L. REV. 1061 (1980) (footnotes omitted).

No female is safe from the violent rapist: Children are raped (as in the instant case); 80-year old women are raped; and even nuns are now prey to the rapist. Washington Post, Oct. 21, 1981, at C7 (Montgomery County, Md.); N.Y. Post, Nov. 2, 1981 at 1 (East Harlem, N.Y.).

The Washington Legal Foundation submits that the court below failed to consider fully the violent nature of this crime and society's right to be protected from the rapist. We believe that the Nebraska Supreme Court's decision in *Parker v. Roth*, 278 N.W. 2d 106 (1979), *cert. denied*, 444 U.S. 920 (1979) upholding the Nebraska bail provision in question, fully understood and appreciated the nature of the crime of rape in deciding that its classification was not unreasonable for bail purposes. Although discussed by that court at some length, *amicus* believes it bears repeating here:

> Certainly the record before us would not in any manner disclose that the classification was unreasonable. Forcible rape has been recognized as a heinous crime committed not by one seeking sexual gratification but rather by one disposed to violence and seeking to inflict harm and violence upon the victim. *See Groth, et al.*, "Rape: Power, Anger, and Sexuality," 134 Am.J., Psychiatry, p. 1239; Gebhard, "Sex Offenders," Harper and Rowe (1965). The victim of a violent forceful rape is not easily rehabilitated. Rape victims are often emotionally scarred for long periods of time, if not for life. Rape is one of the ugliest of crimes. Its very nature is humiliating to the victim and it is frequently accompanied by violence, forced sodomy, and similar acts that additionally traumatize and humiliate. The victimization of the woman does not necessarily cease with the

termination of the attack itself. Pregnancy, venereal disease, hospitalization, loss of employment, imputations of wantonness and even ostracism by family or neighbors may follow. See "Rape and its Victims, a Report for Citizens, Health Facilities and Criminal Justice Agencies," National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice (1975). Rape is a violent crime because it normally involves force, or the threat of force, or intimidation to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage. See, Note, The Victim in a Forcible Rape Case: A Feminist's View, 11 Am.Crim.L.Rev. 335; Comment, Rape and Rape Laws: Sexism in Society and Law, 61 Cal. L.Rev. 919. The nature of the injury, both physically and emotionally, often committed on a rape victim is of concern to the state. Rape victims often are unable to return to the mainstream of life and more often than not require extensive therapy and counseling. The state does have a legitimate concern in this area. Nor can we say either under the record as we have it or by common knowledge, that the Legislature was wrong in believing that violent rapists repeat their crimes, motivated by emotional forces over which they have no control. See *State v. Sell*, 202 Neb. ——, 277 N.W. 2d 256. In our view, it is not without rational basis for the Legislature and the people to want to protect society by removing therefrom persons accused of violent rape where the proof is evident or the presumption is great. On balance, such a decision does not appear unreasonable. We cannot say that the Legislature in the first instance and the people thereafter were without any rational basis in suggesting that a person who has committed a violent, psychologically motivated crime is not as likely to commit a similar crime while free on bail.

> We totally reject the notion that rape is not a serious crime. Next to murder there is none which ranks higher; and for reasons which we have already noted, perhaps in some cases, death itself would be easier for the victim to handle than continued life. Appellant argues that denial of bail may be acceptable in a noncapital murder, but not in rape. Appellant's basis for that position is that there are crimes which are punishable by far more severe penalties than rape, but are yet crimes which are bailable. We do not accept that argument. The minimum penalty is not the issue in a determination that violent rape, where the proof is evident or the presumption is great, should not be bailable. The real possibility of repeated acts and further victims pending trial is the issue. Society deserves more.

Id. at 115-16.

This Court has also recognized the heinous nature of rape:

> It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. *Short of homicide, it is the "ultimate violation of self."* It is also a violent crime because it normally involves force, or the threat of force, or intimidation, to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychologigal damage. *Because it undermines the community's sense of security, there is public injury as well.*

Coker v. Georgia, 433 U.S. 584, 597-98 (1977) (emphasis added).

Society does indeed deserve more. Unfortunately, the Eighth Circuit apparently believes otherwise.

II. THE EIGHTH AMENDMENT DOES NOT CREATE A RIGHT TO BAIL, BUT ONLY PROVIDES THAT BAIL SHALL NOT BE EXCESSIVE IN THOSE CASES WHERE IT IS OTHERWISE PROPER TO GRANT BAIL.

The eighth amendment states in relevant part: "[e]xcessive bail shall not be required." *Amicus* submits that the plain meaning of that phrase does not support the proposition that bail is required in certain classes of criminal cases. Even the court below acknowledged this: "The state argues that since the express terms of the eighth amendment do not create a 'right to bail,' but merely forbid 'excessive bail,' the state may refuse to grant bail without violating the eighth amendment. We recognize that there is logical support and some authority for this argument." *Hunt v. Roth*, 648 F. 2d 1148, 1157.

Nevertheless, appellee and the Eighth Circuit insist that the right to bail is a necessary implication of the explicit prohibition against excessive bail. The lower court reasoned that "if legislative bodies are free to define any and all offenses as nonbailable, they may deprive the amendment of any force and accused persons of any protection." *Id.* at 1158. Yet it is conceded that bail may be denied for capital offenses, a distinction not expressed in the eighth amendment. According to the lower court's novel interpretation of the eighth amendment, then even those charged with capital offenses should have a right to bail.

The lower court erroneously presumed that the excessive bail clause was intended primarily to limit the legislative power of Congress rather than to limit the discretion of the judiciary in setting individual bail. *Amicus* submits that the lower court's view is completely contrary to the constitutional history of the eighth amendment and judicial interpretation. Even this Court had occasion to state: "The Eighth Amendment is *addressed to the courts* of the United States exercising criminal

jurisdiction, and is doubtless mandatory to them and a limitation upon their discretion." *Ex parte Watkins*, 32 U.S. (7 Pet.) 568 (1833) (emphasis added). Accordingly, the legislatures are empowered to define those classes of crime for which bail would be denied, and, *a fortiori*, the people of a sovereign state through their own constitution.

Amicus submits that the history of the bail provision indicates that the Framers never intended that there be a right to bail in all cases. Stated briefly, the Framers of the Constitution were well aware of the historical problems of bail in England and could easily have provided that a right to bail exist if they had so desired.[4] They were not, however, attempting to incorporate a new right into the Federal Constitution. This is further suggested by the fact that (1) the excessive bail clause was a noncontroversial provision that provoked little discussion when considered, and (2) shortly before the eighth amendment was approved, Congress passed the Judiciary Act of 1789. That act established a statutory right to bail in noncapital cases and provided that bail was discretionary in capital cases. Therefore, it would have been contradictory for Congress first to pass a law *denying* bail in certain cases and shortly thereafter to approve an amendment *granting* a right to bail without much discussion or controversy.

Although the Supreme Court has not directly ruled on whether there is a right to bail under the eighth amendment, *amicus* submits that weight of judicial authority clearly supports the view that there is no such right. In

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[4] The Framers knew very well how to express constitutional "rights" in no uncertain terms. *E.g.*, first amendment ("freedom of speech"; "right of the people peaceably to assemble") second amendment ("right of the people to keep and bear arms") fourth amendment ("right of the people to be secure in their persons"), *et seq.* For a comprehensive historical analysis of the eighth amendment's excessive bail clause see Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33 (1977); Meyer, *Constitutionality of Pretrial Detention*, 60 GEO. L. J 1139 (1972).

Carlson v. Landon, 342 U.S. 524 (1952) this Court stated:

> The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. Indeed the very language of the amendment fails to say all arrests must be bailable. We think clearly, here that the Eighth Amendment does not require that bail be allowed under the circumstances of these cases.

Id. at 545-46.

Despite this clear language, the court below preferred to rely instead on the dissenting opinion of Justice Burton in *Carlson*. 648 F.2d at 1157.

While it is true that prior to *Carlson* this Court had referred in dicta to the "traditional right to freedom before conviction," *Stack v. Boyle*, 342 U.S. 1 (1951), *amicus* submits that such language is hardly a basis upon which to overthrow Nebraska's constitutional provision, especially when the *Stack* case was concerned with whether bail had been excessive for a crime that was made bailable by statute. In addition to *Carlson*, other federal and state court decisions lend support for *amicus'* position that bail is not a right. *Sistrunk v. Lyons*, 646 F.2d 64 (3d Cir. 1981); *Mastriam v. Hedman*, 326 F.2d 708 (8th Cir. 1964), *cert. denied*, 376 U.S. 965 (1964); *Turco v. State of Maryland*, 324 F. Supp. 61 (D. Md. 1971), *aff'd*, 444 F.2d 56 (4th Cir. 1971); *United States ex rel. Covington v. Coparo*, 297 F. Supp. 203 (S.D.N.Y. 1969); *Parker v. Roth*, 278 N.W. 2d 106 (1979), *cert. denied*, 444 U.S. 920 (1979); *Edwards v. United States*, 430 A.2d 1321 (1981), *petition for cert. filed* (No. 81-5017).

Accordingly, *amicus* submits that the plain language of the eighth amendment, constitutional history, and the overwhelming weight of judicial precedent clearly demonstrate that there is no constitutional right to bail.

III. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT IS NOT VIOLATED BY THE 1978 BAIL AMENDMENT TO THE NEBRASKA CONSTITUTION DENYING THE RIGHT TO BAIL TO SEXUAL OFFENDERS WHERE THE "PROOF IS EVIDENT OR THE PRESUMPTION GREAT."

The equal protection clause of the fourteenth amendment to the Constitution of the United States prohibits states from denying any person within their jurisdiction equal treatment under the law. The primary thrust of the equal protection clause is to ensure that all persons in similar circumstances receive similar treatment.

In determining whether a state's action has violated the constitutional guarantee of equal protection the classification in question is subject to two principal tests formulated by this Court. When the state action intrudes upon the individual's ability to exercise a "fundamental constitutional right" such as voting or speech or involves a "suspect class" such as race or national origin then that state action will be subject to the strict scrutiny or compelling interest test. *See, e.g., Massachusetts Board of Retirement v. Murgier*, 420 U.S. 307 (1976). The strict scrutiny test requires that the classification in question be necessary to promote a compelling state interest in order not to be in violation of the Constitution. Where neither a "fundamental right" nor a "suspect class" is involved the Supreme Court has employed a "minimum scrutiny" or "rational basis" test. Under the latter analysis, the state must show that the classification bears some rational relation to a legitimate governmental interest. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618 (1969).

The Washington Legal Foundation contends, however, that the right to bail is not a Constitutionally guaranteed fundamental right. As noted earlier, the eighth amendment prohibition against excessive bail does not

provide a fundamental right to bail since the eighth amendment is only pertinent in bailable cases. As recognized by this court in the landmark case of *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973), it is not the function of the courts to create substantive constitutional rights where they are not either implicitly or explicitly guaranteed by the Constitution. In the absence of a specific constitutional mandate, the people of Nebraska should be deemed to have acted within their Constitutional powers in enacting the 1978 bail amendment.

Furthermore, as noted earlier in this brief, the classification in question is a reasonable one designed to protect the community from particular reprehensible and violent crime. If the Nebraska classification had been for a non-violent crime, such as check forgery or embezzlement, then appellee's argument may have some merit. But a state is under no obligation to choose between attacking a particular evil wholesale or not attacking it at all.

Amicus stresses that, as pointed out by appellant in its brief at 30, the Nebraska constitutional provision in question does not foreclose the opportunity to bail to appellant. It merely states that he and others in his class do not have any right to bail. Whether bail is granted or not is limited to the exercise of the sound discretion by the court, a discretion which was not abused. Accordingly, the lower court mistakenly characterized the Nebraska provision as creating an "irrebuttable presumption that every individual charged with this particular offense is incapable of assuring his appearance by conditioning it upon reasonable bail or is too dangerous to be granted release." 648 F.2d at 1164.

CONCLUSION

Society has a right to take all reasonable measures necessary to protect its citizens from all crime, especially crimes of violence. Forcible rape has been shown to be increasing at alarming proportions, and the Nebraska provision denying the right to bail in those cases where the "proof is evident" or "the presumption great" is a constitutional response to that problem. The eighth amendment does not provide a right to bail in all cases nor is the fourteenth amendment offended by the provision in question. Accordingly, *amicus* submits that the lower court seriously erred in fashioning a right to bail and urges this Court to reverse the decision of the Eighth Circuit.

Respectfully submitted,

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